

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
3 HONORABLE STANLEY BLUMENFELD, JR., U.S. DISTRICT JUDGE
4

5 SANTA CLARITA VALLEY WATER AGENCY,)
6 PLAINTIFF,) CASE NO.
7 vs.) CV 18-06825-SB
8 WHITTAKER CORPORATION, et al.,) VOLUME 19
9 DEFENDANTS.) PAGES 2019 TO 2125
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14 TRIAL DAY 10
15 THURSDAY, DECEMBER 2, 2021
16 8:02 A.M.
17 LOS ANGELES, CALIFORNIA
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INDEX OF WITNESSES

WITNESSES

PAGE

(None)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF EXHIBITS

NUMBER	DESCRIPTION	FOR	FOR
		IDENTIFICATION	EVIDENCE
		PG.	PG.

(None)

1 THURSDAY, DECEMBER 2, 2021; 8:02 A.M.

2 LOS ANGELES, CALIFORNIA

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08:02AM

4
5 THE CLERK: This is case number CV 18-6825,
6 Santa Clarita Valley Water Agency versus Whittaker Corporation,
7 et al.

8 Counsel, please state your appearances.

08:02AM

9 MR. RICHARD: Good morning. Patrick Richard for
10 plaintiff. With me is Ms. Scott, Mr. Gee, and Ms. Micevych
11 stepped out, and Mr. Fudacz stepped out but will be returning
12 shortly, Your Honor.

13 THE COURT: Good morning.

08:02AM

14 MR. BLUM: Good morning, Your Honor. Fred Blum
15 for Defendant Whittaker. With me this morning is
16 Mr. Trowbridge and Mr. Gallagher. Mr. Lardiere will be here in
17 a moment, and Mr. Fryer is here.

18 Your Honor, I just sent your clerk a WeTransfer
19 file that contains the closing minus the special verdict form.

08:03AM

20 THE COURT: Thank you. And good morning,
21 everyone. We are outside the presence of the jury.

22 First of all, I did receive a message this
23 morning that the plaintiff does not intend to introduce any
24 further evidence including the evidence from Gaynor,

08:03AM

25 G-a-y-n-o-r, Dawson.

1 Is that correct?

2 MR. RICHARD: That's correct, Your Honor. We
3 took another look and didn't seem like we needed it.

08:03AM

4 THE COURT: So at this point all parties have
5 rested. The Court did provide to counsel last night the latest
6 version of the instructions with some highlighted sections that
7 remain open questions. And I'm going to start with the new
8 material that was provided by plaintiff last night. And by
9 "new," I mean a request to add some language to the nuisance
10 elements.

08:04AM

11 So let me hear from you, Mr. Blum, whether
12 there's any objection.

08:04AM

13 MR. BLUM: Your Honor, my understanding, they
14 only changed the definition of ownership on it, and if that's
15 the only change, then we have no problem with it.

16 THE COURT: All right. And so I'm going to --
17 it's going to say that SCV owned, leased, occupied, or
18 controlled the property, namely, the water wells.

08:04AM

19 MR. BLUM: Yes, sir. Your Honor, that's under
20 one of the factors that they have to prove; correct?

21 THE COURT: It is.

22 MR. BLUM: That's fine then, Your Honor.

08:04AM

23 THE COURT: Then I'm going to include that both
24 in what is my Instruction 15, private nuisance essential
25 factual elements, and it appears in one other place. Let me

1 just make sure I'm making the change.

2 Did this appear in two locations? I thought it
3 did.

08:05AM 4 MS. SCOTT: Yes, Your Honor. The other location
5 would be your Instruction No. 19 for trespass.

6 THE COURT: I see. So I thought it was in two
7 nuisance locations, but it's in the trespass in 19. I will
8 make the change as well there without objection.

9 Then let me turn to --

08:06AM 10 MR. BLUM: Your Honor, as to trespass, does it
11 say, namely, the water wells? Trespass has to be the land, not
12 the water wells.

13 THE COURT: This just says the property. It
14 doesn't -- the --

08:06AM 15 MR. BLUM: That's fine.

16 THE COURT: So you're okay with the change with
17 the reference to the property, not to the water wells?

18 MR. BLUM: Correct, Your Honor.

08:06AM 19 THE COURT: All right. Then it will be that
20 "SCV Water owned, leased, occupied, or controlled the property
21 for trespass," and that's given without objection.

22 MR. BLUM: Your Honor, to be clear, the change is
23 okay. We still object for other reasons stated.

08:06AM 24 THE COURT: Understood. And the objection that
25 you're stating relates generally to the property interests that

1 we're going to talk about as well in what is my Instruction 26?

2 MR. BLUM: Your Honor, I don't want to repeat

3 what I've said. For the same basis we raised yesterday and in

4 the JMOLs which deals with the propriety of the instruction,

08:07AM 5 et al., and all of the issues of the factories' rights. Again,

6 I don't want to repeat it.

7 THE COURT: I do understand that. I also do want

8 to address your instruction which I said remained to be

9 decided. I hadn't decided that.

08:07AM 10 I recognize, Mr. Blum, that there is an issue

11 with respect to the JMOL which I haven't decided. But I'm

12 proceeding with the jury instructions which, if I agree with

13 you on the JMOL, will turn out to be largely an academic

14 exercise. But given that I am instructing the jury, you are

08:07AM 15 requesting Instruction 26, plaintiff's property interest, in

16 order to address the issue you have raised on the JMOL;

17 correct?

18 MR. BLUM: Yes, Your Honor.

19 THE COURT: All right. So let us turn to that

08:08AM 20 because, as I said, I haven't decided that issue. I did take a

21 look and, Mr. Blum, I don't know -- I'm sorry. Mr. Richard, I

22 think you are addressing this. You addressed it yesterday. I

23 did take a further look at the case law now in light of the

24 evidence that has been elicited. When I previously ruled on

08:08AM 25 this issue, it was my understanding that the plaintiff was

1 going to introduce different evidence than it wound up
2 introducing. I thought it was going to introduce evidence of
3 property ownership, and the evidence that was introduced is
4 thin, in my view, questionable, in my view. But I will have to
08:09AM 5 further consider that in the context of the JMOL.

6 All I mean to convey is that it is a question in
7 my mind. I took a look at the excerpts from Mr. Alvord's
8 testimony, and his testimony was not crystal clear on the issue
9 of ownership, it seemed to me. I still have to look at it more
08:09AM 10 carefully. I haven't had time.

11 The other item of evidence that I expected might
12 be elicited was that there was actual contamination of the
13 subsurface interests other than the water at the water agency
14 location. And as I understand it, there really has -- there is
08:10AM 15 no evidence of that. The only evidence is Mr. Richard's
16 correct observation that there is some hydrogeologic evidence
17 that, with the concept of absorption and other hydrogeological
18 concepts, there can be a certain amount of sticking of the --
19 of the chemical to the surrounding soil.

08:10AM 20 I don't know where that necessarily gets you in
21 terms of cases like *Orange County Water District versus Sabic*,
22 S-a-b-i-c.

23 So I am going to give you an opportunity to
24 address that again, Mr. Richard, but I am concerned about
08:11AM 25 whether there is evidence in this case that would require the

1 Court to give Instruction 26. That is to say that a reasonable
2 jury arguably can conclude that the only contamination was of
3 the water here and not of the property. And I know you
4 mentioned the wells. I'm not sure how the wells were -- and
08:11AM 5 what the evidence is on how the wells were somehow harmed.

6 So I will let you address that, but I will tell
7 you that I'm seriously considering giving this instruction.

8 MR. RICHARD: When Your Honor says this
9 instruction, which one?

08:11AM 10 THE COURT: This is the plaintiff's property
11 interest which I indicated was to be decided. It should be 26
12 of what I sent last night. It's "For plaintiff to recover
13 restoration damages, it must first prove it has a possessory
14 interest," and then it goes into appropriative right and
08:12AM 15 interest in land.

16 MR. RICHARD: Yes, Your Honor. It's what we
17 previously had as No. 60. I see.

18 This is the appropriative right, the interest in
19 land. This is an incorrect statement of the law. I believe we
08:12AM 20 briefed this that our negligence and nuisance and trespass
21 claims can squarely be based on our rights to groundwater. And
22 the contamination of the groundwater I'm not -- we actually
23 cited the authority on that point. The notion that we need to
24 have soil samples in addition to groundwater pollution I don't
08:12AM 25 think is supported by the case law.

1 THE COURT: Why don't you address the *Sabic* case.
2 That might be useful to the Court since that case, which
3 Whittaker has relied heavily on, does in the context of
4 trespass and nuisance distinguish between use of usufructuary
08:13AM 5 rights or appropriative rights in groundwater and whether that
6 is sufficient to allow for trespass and nuisance claim. And in
7 that case, the Court concluded that it was not sufficient.

8 MR. RICHARD: Yes, Your Honor. I don't have that
9 case with me. I know we were relying on *City of Pomona*, a
08:13AM 10 9th Circuit decision.

11 THE COURT: The *City of Pomona* case, as I recall,
12 wasn't dealing with trespass and nuisance, was it?

13 MR. RICHARD: I thought it addressed common law
14 claims more broadly, Your Honor.

08:14AM 15 THE COURT: All right. So here's the state law
16 case dealing with state law claims. And are you able to
17 address how you would distinguish that case?

18 MR. RICHARD: Honestly, as I stand here,
19 Your Honor, I don't know what -- our briefing on that. I know
08:14AM 20 we relied on *Starrh and Starrh* and the orange city -- or
21 *Orange County Water District* decision as well as other
22 authority.

23 THE COURT: The 9th Circuit case that you're
24 referring to was a negligence case. *Starrh and Starrh* and
08:14AM 25 these other cases that this Court also relied upon was

1 predicated on proof that your subsurface rights, which your
2 client had an ownership interest in, were invaded.

3 *Starrh and Starrh*, as you may recall, involves a
4 case of oil contamination, I believe, where there was actual
08:14AM 5 offsite migration into the subsurface of the plaintiff. And
6 that's why yesterday, when I was focused on the fact that the
7 evidence here really only shows groundwater contamination
8 onsite -- that is on your client's site --

9 MR. RICHARD: The issue, I believe, in *Starrh and*
08:15AM 10 *Starrh* was there was no allegation of use of water for any
11 purpose other than to benefit the land itself. So we're
12 relying on the principle that, where the groundwater is
13 actually used and the groundwater has been contaminated, that
14 provides sufficient standing to allege trespass nuisance and
08:15AM 15 negligence in California.

16 THE COURT: I don't know, Mr. Richard, that the
17 issue is standing. The issue has to do with the kind of claim
18 that you're presenting. And so a trespass claim necessarily
19 presupposes a possessory interest that has been trespassed
08:15AM 20 upon. And there's a similar theory with regard to nuisance,
21 and that's what the *Sabic*, S-a-b-i-c, case is discussing. So
22 it discusses not a threshold standing question but the
23 fundamental nature of the claims that are being asserted.

24 MR. RICHARD: Well, in *Starrh and Starrh*, I mean,
08:16AM 25 it was the absence of an allegation regarding use of the water.

1 But as Your Honor just phrased it, an evidence of an interest
2 in the land beneath the wells and piping and pumping, that's
3 Mr. Alvord's testimony that for all these wells the water
4 agency after the merger either owns or has exclusive right to
08:16AM 5 control that land.

6 THE COURT: Well, putting aside what he said --
7 and I'm not sure what he said is entirely clear -- that still
8 doesn't address the facts of this case. The facts of this case
9 involve groundwater contamination on your client's property.

08:17AM 10 MR. RICHARD: Right.

11 THE COURT: And it's distinguishable from *Starrh*
12 in that case, in that situation.

13 MR. RICHARD: Yes. Because our client uses the
14 contaminated groundwater, and it needs to be remediated.

08:17AM 15 THE COURT: All right. Do you have anything
16 further that could explain to the Court why *Sabir* doesn't apply
17 here?

18 MR. RICHARD: Your Honor, actually, I'd have to
19 grab my copy of the case.

08:17AM 20 THE COURT: Let me hear from Mr. Blum because
21 there is an issue in *Sabir* that I find at least to be of
22 concern in terms of the instruction that you're suggesting, and
23 that is footnote 37 which says "We need not consider whether a
24 trespass claim would be viable if the district were extracting
08:17AM 25 or capturing water in the south basin that was contaminated."

1 As you know, *Sabic* focused quite heavily on
2 usufructuary rights and the nature of those particular rights
3 in the context of this case, and then it drops this disclaimer.
4 In this case we have extraction. So what am I to do with that?

08:18AM

5 MR. BLUM: Well, Your Honor, that's always
6 difficult when a court says we're not dealing with this, but in
7 essence they dealt with it. They dealt with it. They didn't
8 do it in the sense of a trespass claim. I think it's a
9 nuisance claim they dealt with it.

08:18AM

10 But the nuisance and trespass rules are pretty
11 much the same with some minor differences in terms of the
12 causes of action. And the rights don't change which is why
13 this case isn't *Starrh*.

08:18AM

14 *Starrh* was a possessory case. They had a
15 possessory interest in the land. That means you interpret the
16 trespass rules with water differently. That's the base --
17 that's one of the basic holdings of the *Orange County* case.

08:19AM

18 When you deal with usufructuary rights like we
19 clearly have here, it's different. And it doesn't matter
20 whether it's a nuisance claim, and it doesn't matter whether
21 it's a trespass claim. It's dealt with the same. And I don't
22 think the footnote says other than -- I want to say this
23 respectfully to the appellate court. We don't have to deal
24 with what we don't have to deal with. And since it's not a
25 trespass claim here, we're not going to make the decision

08:19AM

1 because we don't have to.

2 THE COURT: If there was evidence in this case
3 that the water agency owned the land, not just the well -- the
4 right to extract water and the wells but they actually owned
08:19AM 5 the surrounding land, would that be like the *Starrh and Starrh*
6 case?

7 MR. BLUM: No. Because what *Sabic* and *Starrh*
8 combined say is the extraction of the water has to be used to
9 benefit the property. The extraction here doesn't benefit the
08:20AM 10 property. It benefits their parties. They extract it to use
11 it somewhere else. That's why it's a usufructuary right and
12 not a possessory right.

13 THE COURT: And the argument that you have raised
14 extends to trespass and nuisance claims, not to negligence --
08:20AM 15 the negligence claim.

16 MR. BLUM: No. I think it does extend to the
17 negligence claim.

18 THE COURT: And what authority are you relying
19 upon that suggests it extends to the negligence claim?

08:20AM 20 MR. BLUM: Well, first, as Your Honor said, it
21 goes to the basic restoration damages. It extends -- it
22 doesn't extend to the claim as much as it extends to the claim
23 for damages. And when they're asking to restore, it really
24 doesn't matter in a real sense the name of the cause of action
08:20AM 25 because, if you look at the negligence cause of action, other

1 than the -- other than some of the remedies and some of the
2 nature that's unique to nuisance, they have to prove negligence
3 in order to prevail on both of them -- I mean, all three
4 claims.

08:21AM 5 So there's not that much difference between them.
6 There's no policy difference that would make --

7 THE COURT: Well, the claims are different, are
8 they not? When you're talking about a trespass claim, for
9 example, an element that's fairly critical is the superior
08:21AM 10 possessory interest whereas with the negligence claim that's
11 not the case, is it?

12 MR. BLUM: True, Your Honor. But if you look at
13 the technical end, yes, they're different. But in the reality
14 here, they're all three identical. They're asking for the same
08:21AM 15 damages.

16 THE COURT: But what you're doing essentially is
17 asking the Court, are you not, to direct a verdict on the
18 nuisance claim if the jury concludes that the only right that
19 the water company has is to the extracting the groundwater. So
08:22AM 20 if they reach that conclusion based upon that extraction, then
21 you would say they necessarily have to find that the damage
22 claim fails.

23 MR. BLUM: Right. Which would eliminate
24 nuisance, trespass, and negligence.

08:22AM 25 THE COURT: Although you started, if I understood

1 you correctly, with this is essentially a limitation on damages
2 with respect to negligence.

3 MR. BLUM: Your Honor, that's because it came up
4 in the context of the rest -- it wasn't that important,
08:22AM 5 Your Honor, until restoration damages became an issue.

6 THE COURT: You're not able to cite the Court to
7 any authority where a Court has held that the same analysis
8 contained in *Sabic* and *Starrh* and *Starrh* would apply to a
9 negligence claim?

08:23AM 10 MR. BLUM: May I talk to Mr. Trowbridge for a
11 moment, please?

12 THE COURT: Yes.

13 (Counsel confer.)

14 MR. RICHARD: Your Honor, can I just ask, just to
08:23AM 15 be on the same page, where defendant cited the *Sabic* case? I'm
16 looking at their motion. I'm looking at their briefing on this
17 instruction. I want to make sure we're talking about the same
18 case.

19 THE COURT: I thought they had cited it, but the
08:23AM 20 citation is 14 Cal App. 5th 343. I'll repeat it.
21 14 Cal App. 5th 343.

22 MR. RICHARD: Thank you.

23 THE COURT: Mr. Blum.

24 MR. BLUM: Just a second, please, Your Honor.
08:23AM 25 I'm just reading something.

1 Your Honor, it's not directly on point, but if
2 you take a look at the case notes under CACI No. 3903(f) under
3 sources and authority, the third one makes clear that the
4 instruction applies to injury to real property which is what
08:24AM 5 the negligence claim is. I don't think -- I don't think the
6 instruction is any different for any cause of action as long as
7 they're claiming damage to real property.

8 THE COURT: But that doesn't squarely address
9 this issue, does it?

08:24AM 10 MR. BLUM: I agree. I hope I made that clear.
11 It's not directly -- not directly answering your question.

12 THE COURT: Right. But it's not that it isn't
13 directly on point. It's that it doesn't address the issue.
14 What about the *Pomona* case which you have cited to the Court, I
08:25AM 15 believe, numerous times. Doesn't that case hold that a
16 usufructuary right can confer standing for a negligence claim?

17 MR. BLUM: Your Honor, we're not claiming that,
18 if you have -- if you only have usufructuary rights you can
19 never have standing, but you have to prove it. This is an
08:25AM 20 issue of proof. This is not an issue of are they barred
21 because they have usufructuary rights. We're not claiming
22 they're barred. We're saying they still have to prove their
23 claim, and they haven't. I think that's the point we're trying
24 to make, Your Honor.

08:25AM 25 THE COURT: All right. What I am inclined to do

1 on this, but I want to -- just to take a moment further to
2 think about it -- is I will give you the last word, if you'd
3 like to be heard further, Mr. Richard, but I'm inclined to give
4 the instruction but limit it to trespass -- the trespass and
08:26AM 5 nuisance claims.

6 Mr. Richard, do you wish to be heard further?

7 MR. RICHARD: No. I believe we have briefed it.
8 Just so the record is clear, we don't think it's an appropriate
9 instruction, but I understand Your Honor's inclination.

08:26AM 10 THE COURT: All right. And I do think the law is
11 not crystal clear on this issue, particularly with respect to
12 nuisance. And then -- I'm sorry. With regard to negligence.
13 And I think there is a question that the *Sabic* case has raised
14 with regard to that footnote. And the Court doesn't have the
08:26AM 15 benefit of really any useful briefing in my view on this
16 particular issue. But I have to make a call, and that's the
17 call I'm going to make.

18 With regard to negligence per se, Mr. Richard, if
19 you wish to be heard further on this -- I'm sorry -- Mr. Gee,
08:27AM 20 if you wish to be heard further on this, I will hear you. I'm
21 inclined not to give this instruction at all and find
22 essentially that you have waived this issue or not properly
23 presented it.

24 I have looked at the third party -- the Third
08:27AM 25 Amended Complaint and the history surrounding how this has been

1 presented, and it really has been at best delayed
2 substantially. It's been evolving. You have initially in the
3 Third Amended Complaint cited just a laundry list of general
4 statutes where the law appears to support reasonably that you
08:27AM 5 have to provide specific statutory authority. And then only
6 recently have you started to roll out some specific statutes
7 beginning with the Porter-Cologne Act statute where you do cite
8 a case that supports a presumption but it's relating to a
9 different statute within the -- within that act. And you, as I
08:28AM 10 understand it, only presented that in October, very recently,
11 while this case was trailing for trial. And then more
12 recently, still, you have presented these L.A. County
13 ordinances.

14 These are difficult issues. What I mean by that
08:28AM 15 is, in order to determine whether it is appropriate to present
16 a negligence per se instruction where you're essentially just
17 throwing into the jury box, in a manner of speaking, statutes
18 that you're asking them to figure out if it applies, it
19 requires, it seems to me, much earlier notice where the other
08:29AM 20 side can look at what you're claiming, if they wish, conduct
21 discovery to see if it is applicable. Further, they can
22 potentially file briefing in the ordinary course so that the
23 Court can make a determination as to whether, in fact, it is
24 applicable and does raise the presumption. And to present it
08:29AM 25 for the first time essentially during trial when we're

1 instructing really, in my view, imposes a real burden on the
2 system that threatens due process.

3 I don't believe that the defense has been given a
4 fair opportunity to explore this issue both factually and
08:30AM 5 legally, and I know the Court hasn't. The Court is being
6 thrust upon last minute to make a determination as to whether
7 these statutes apply in the -- in the midst of trial without
8 having the benefit of time for deliberation and to hear whether
9 the evidence and the law has been properly developed and
08:30AM 10 presented in a proper way.

11 And so I just don't see how I can give this to
12 the jury in any fashion other than I'm throwing it out there
13 because I don't know whether it is appropriate to do so, and
14 you're thrusting a statute upon everybody.

08:30AM 15 MR. GEE: Your Honor, we will submit it.

16 THE COURT: All right. So with regard then to
17 apportionment of responsibility, Mr. Blum, you were going to
18 tell the Court whether you even wanted that instruction.

19 MR. BLUM: Your Honor, we withdraw it. I'm
08:31AM 20 sorry, Your Honor. I have a dissenting opinion here.

21 THE COURT: All right.

22 MR. BLUM: Your Honor, can I amend that? We
23 withdraw a request for anything other than SIC.

24 THE COURT: That's fine. The Court will give it.
08:31AM 25 I don't know what its practical significance is, but I think it

1 is appropriate to give it as to SIC.

2 Anyone disagree on the plaintiff's side?

3 Mr. Richard?

4 MR. RICHARD: Well, as I said yesterday, we
08:31AM 5 disagree that the evidence supports this instruction at all.

6 Nothing I've heard changes that. Dr. Hokkanen said he did not
7 have an opinion. But I understand the Court's opinion.

8 THE COURT: All right. I am going to give the
9 instruction as requested by Whittaker which will be limited to
08:31AM 10 SIC.

11 Let me see if there's anything else that the
12 Court has overlooked. If not, I will just have to conform
13 these instructions, and we will bring in the jury as soon as I
14 am able to do that. We will need to break before then.

08:32AM 15 MR. RICHARD: There is one other issue,
16 Your Honor.

17 THE COURT: Yes.

18 MR. RICHARD: Before we bring in the jury, we'd
19 still like to know if we're cross-defendants.

08:32AM 20 THE COURT: Oh, yes. But actually, before we
21 touch upon that, are there any other issues with the
22 instructions other than those that have been discussed?
23 Otherwise, I will consider them to be settled.

24 MR. RICHARD: No other issues on jury
08:32AM 25 instructions. There's the outstanding verdict form, I believe.

1 THE COURT: All right. Let me hear what the
2 issue is with the -- actually, let me get closure on the
3 settling of the instructions.

4 Mr. Blum?

08:32AM

5 MR. BLUM: Your Honor, we proposed to the
6 plaintiffs we would dismiss it for a cost waiver, but we
7 haven't heard from them.

8 MR. RICHARD: I didn't get a call.

08:33AM

9 THE COURT: Hold on. With regard to the jury
10 instructions, are they now settled?

11 MR. BLUM: For the jury instructions?

12 THE COURT: They're settled?

13 MR. BLUM: Yes.

08:33AM

14 THE COURT: All right. And so now, what's the --
15 what's your response with regard to the -- your client's
16 claims?

17 MR. BLUM: We sent an e-mail last night to the
18 plaintiff that we would dismiss with a cost waiver and haven't
19 heard if they would.

08:33AM

20 THE COURT: Mr. Richard?

21 MR. RICHARD: Yes. I haven't seen that e-mail,
22 but that makes good sense to me, Your Honor.

23 THE COURT: All right.

08:33AM

24 MR. BLUM: Then we would agree to dismiss them,
25 Your Honor.

1 THE COURT: All right. Those claims will be
2 dismissed on the terms that were just now agreed-upon on the
3 record.

08:33AM 4 So with that, then, I'm going to need a moment to
5 conform the instructions.

6 What is the outstanding issue or issues
7 concerning the special verdict form? It will have to be
8 conformed certainly, but what's the issue? Ms. Scott?

08:34AM 9 MS. SCOTT: Yes, Your Honor. The main issue is
10 to have it conform to the jury instructions. There are a
11 couple spots where I believe the special verdict form we
12 initially submitted said "own." That would now be own, lease,
13 occupy, and control.

08:34AM 14 Also, in the trespass section -- and we did send
15 to your clerk Mr. Cruz yesterday a Word version of this just so
16 you would know where the changes are. Under trespass
17 paragraph 4, it initially said just VOCs. That's a little
18 imprecise, I think. We believe the jury should be
19 instructed -- I'm sorry -- the jury should have a verdict form
08:34AM 20 that names the VOCs here -- the TCE, PCE, and perchlorate.

21 The only other issues, I believe there was just a
22 typographical error on paragraph 18 where it instructed the
23 jurors to move on if they answered "No." It should have said
24 "Yes."

08:34AM 25 THE COURT: All right.

1 MS. SCOTT: We made a slight change to the
2 damages at paragraph 24, just giving the jury a single line to
3 make it less complicated. And then again a typographical error
4 after paragraph 27 which just was confusing to the jurors. So
08:35AM 5 we corrected that.

6 THE COURT: And you said you did submit those to
7 Mr. Cruz?

8 MS. SCOTT: Yes. We sent Mr. Cruz an e-mail with
9 a clean Word copy and also a track changes version so you could
08:35AM 10 see where the errors had been corrected.

11 THE COURT: All right. Is there any objection to
12 the corrections that were made?

13 MR. BLUM: Your Honor, we had agreed as to the
14 substantive --

08:35AM 15 THE COURT: Into the microphone, please.

16 MR. BLUM: Your Honor, we had an agreement as to
17 how to describe the substantive issues for the verdict form,
18 but there was a disagreement how damages were laid out. And I
19 don't think you resolved that disagreement.

08:35AM 20 As to those changes to the substantive parts,
21 subject to all the objections we made prior, the wording is
22 fine.

23 THE COURT: All right. The Court will provide
24 you with a clean version at some point today. It may be just
08:36AM 25 as the jury is about to deliberate. But you will get a clean

1 copy, and you will have an opportunity to make sure it
2 conforms, and I will address the damages issue.

3 MR. BLUM: Your Honor, a procedural issue. I
4 know you're not allowed to use your phone to take pictures, but
08:36AM 5 my phone is also a scanner. May I scan the verdict form with
6 my phone?

7 THE COURT: Yes.

8 MR. BLUM: Thank you.

9 THE COURT: All right. Ms. Scott, I do need to
08:36AM 10 leave the bench now. Is there something that you wish to
11 address?

12 MS. SCOTT: Just briefly, Your Honor. I just
13 wanted to confirm that the parties are in agreement that
14 prejudgment interest will be addressed by the Court and the
08:36AM 15 jury does not need to do that.

16 THE COURT: Mr. Blum?

17 MR. BLUM: Assuming they have a right to it,
18 that's correct.

19 THE COURT: All right. We will be in recess just
08:36AM 20 so I can conform these changes.

21 Thank you.

22 (A recess was taken at 8:36 a.m.)

23 THE COURT: We are back on the record in
24 Santa Clarita Valley Water Agency versus Whittaker. We're
08:51AM 25 outside the presence of the jury.

1 And my understanding is that there is an issue
2 that the defense wishes to raise with the Court.

3 MR. BLUM: Your Honor, one of the issues on the
4 JMOL was punitive damages. I know you haven't ruled on it.
08:51AM 5 But we would ask a ruling just on the punitive damage aspect.
6 And the reason is that, more than anything else that we have
7 moved on, the ability of the plaintiff to argue that their
8 rights to punitive damages changes the whole context in which
9 they can argue.

08:51AM 10 Because punitive damages are on the table, they
11 can make arguments about public policy, the harm to the public
12 generally that they might never be allowed to make otherwise.

13 THE COURT: All right. I am going to be denying
14 the JMOL across the board. So they can argue the punitive
08:52AM 15 damages issue.

16 Actually, let me restate that. I'm going to
17 defer ruling on the JMOL until the close, but I am going to
18 permit argument on the issue of punitive damages. But you have
19 at least the Court's inclination that I'm likely going to deny
08:52AM 20 it. But I'm going to give myself at least an opportunity to
21 further reflect upon it. But the request by the defense to
22 exclude the punitive damages at this point is denied.

23 Let's go ahead and bring in the jury, please.

24 And I do need to have the -- before you go, I
08:53AM 25 have a PowerPoint that's up here that should not be -- that

1 should not be up. One moment, please.

2 All right. We can bring them in. Thank you.

3 (The following proceedings were held in

4 open court in the presence of the jury:)

08:56AM 5 THE COURT: We remain on the record now in the
6 presence of the jury.

7 Good morning, ladies and gentlemen.

8 THE JURY: Good morning.

9 THE COURT: At this time, both sides have rested.

08:56AM 10 And so there is no further evidence that you will be hearing.

11 At this point, I am going to be providing you
12 with the final jury instructions. You will receive a copy of
13 these instructions in Word form with you. So I invite your
14 close attention to the instructions as I will be reading them.

08:57AM 15 But you will have the ability to look at these instructions in
16 the jury room to refer back to them, if you wish.

17 Also, the lawyers do have an opportunity in
18 closing arguments to argue these instructions and how these
19 instructions apply to the facts as they believe the facts have
08:57AM 20 been revealed. To the extent that they misstate the law as I
21 have presented it or will present it to you, ignore their
22 arguments and go with these instructions.

23 But now that you have heard all of the evidence,
24 it is my duty to instruct you on the law that applies to this
08:57AM 25 case. It is your duty to find the facts from all the evidence

1 in the case. To those facts, you will apply the law as I give
2 it to you. You must follow the law as I give it to you,
3 whether you agree with it or not. And you must not be
4 influenced by any personal likes or dislikes, opinions,
08:58AM 5 prejudices, or sympathy. That means that you must decide the
6 case solely on the evidence before you. You will recall that
7 you took an oath to do so.

8 Please do not read anything into these
9 instructions or anything I may say or do or have said or done
08:58AM 10 throughout the course of this trial as indicating that I have
11 an opinion regarding the evidence or what your verdict should
12 be.

13 Now, I do want to provide you with some basic
14 evidentiary principles, beginning with one that you may
08:58AM 15 generally be familiar with, and that is ignorance of the law
16 does not excuse a person from -- for violating the law.

17 Also, you may consider the ability of each party
18 to provide evidence. If a party provided weaker evidence when
19 it could have provided stronger evidence, you may distrust the
08:59AM 20 weaker evidence.

21 Now, you have heard testimony from experts, a
22 number of experts, who testified to opinions and the reasons
23 for their opinions. This opinion testimony is allowed because
24 of the education or experience of these witnesses.

08:59AM 25 Such opinion testimony should be judged like any

1 other testimony. You may accept it or reject it and give it as
2 much weight as you think it deserves, considering the witness's
3 education and experience, the reasons given for the opinion,
4 and all the other evidence in the case.

08:59AM

5 When a corporation designates a Rule 30(b)(6)
6 deponent, that witness is authorized to speak for the
7 organization on the specified matters, unlike other employees
8 deposed in the litigation. The testimony of a Rule 30(b)(6)
9 representative is an evidentiary admission.

08:59AM

10 When you evaluate the testimony of a
11 Rule 30(b)(6) representative, you may have to decide which
12 testimony to believe and which testimony not to believe. You
13 may consider the credibility of the witness in determining
14 whether to believe the testimony of a Rule 30(b)(6)
15 representative.

09:00AM

16 Now I'm going to explain some general liability
17 principles. And the first has to do with the liability of a
18 corporation. Whenever I refer, by the way, to "Whittaker," I
19 think you know by now I'm referring to Whittaker Corporation.
20 Whittaker Corporation is the defendant in this lawsuit.

09:00AM

21 Under the law, a corporation is considered to be
22 a person. It can only act through its employees, agents,
23 directors, or officers.

09:00AM

24 Therefore, a corporation is responsible for the
25 acts of its employees, agents, directors, and officers

1 performed within the scope of authority.

2 Now I'm going to talk to you about an idea or
3 concept called "successor liability."

4 Now, Whittaker Corporation is the successor to
09:01AM 5 the Bermite Powder Company, and Bermite occupied the site from
6 1943 until Whittaker purchased it in 1967. Whittaker is,
7 therefore, liable for any act or omission by Bermite that
8 resulted in negligence, nuisance, or trespass.

9 And one other liability concept is that of
09:01AM 10 vicarious responsibility.

11 One may authorize another to act on one's behalf
12 in transactions with third parties. This relationship is
13 called "agency." The person giving the authority is called
14 "the principal." The person to whom authority is given is
09:01AM 15 called "the agent."

16 An employer is responsible for harm caused by the
17 wrongful conduct of its employees while acting within the scope
18 of their employment.

19 Now, with regard to the claims in this case, I'm
09:02AM 20 going to first just give you a bird's-eye view of the different
21 claims that are asserted, and then I'm going to drill down and
22 give you instructions that apply to the claims, starting with
23 negligence. Negligence is the first claim that is asserted by
24 the Santa Clarita Valley Water Agency. They also assert a
09:02AM 25 claim for private nuisance. They assert a claim for public

1 nuisance. And they also assert a claim for trespass.

2 So with respect to all of these claims, when a
3 party has the burden of proof on any claim -- or we will get to
4 affirmative defenses asserted by Whittaker. When a party has
09:02AM 5 the burden of proof on any claim or affirmative defense by a
6 preponderance of the evidence, it means you must be persuaded
7 by the evidence that the claim is more probably true than not
8 true. You should base your decision on all the evidence,
9 regardless of which party presented it.

09:03AM 10 Now we start with Claim No. 1, Negligence. And
11 this is regarding the basic standard of care.

12 Negligence is the failure to use a reasonable --
13 strike that.

14 Negligence is the failure to use reasonable care
09:03AM 15 to prevent harm to oneself or to others. A person can be
16 negligent by acting or by failing to act. A person is
17 negligent if that person does something that a reasonably
18 careful person would not do in the same situation or fails to
19 do something that a reasonably careful person would do in that
09:03AM 20 same situation.

21 You must decide how a reasonably careful person
22 would have acted in Whittaker's situation.

23 Now, here are the elements of a negligence claim.

24 The Santa Clarita Valley Water Agency claims that
09:04AM 25 it was harmed by Whittaker's negligence. To establish this

1 claim, SCV Water must prove all of the following:

2 One, that Whittaker was negligent;

3 Two, that SCV Water was harmed; and

4 Three, that Whittaker's negligence was a

09:04AM

5 substantial factor in causing SCV Water's harm.

6 What is a substantial factor? A substantial
7 factor in causing harm is a factor that a reasonable person
8 would consider to have contributed to the harm. It must be
9 more than a remote or trivial factor. It does not, however,

09:04AM

10 have to be the only cause of the harm.

11 A person who owns property is negligent if that
12 person fails to use reasonable care to keep the property in a
13 reasonably safe condition. A person who owns property must use
14 reasonable care to discover any unsafe conditions and to
15 repair, replace, or give adequate warning of anything that
16 could be reasonably expected to harm others.

09:05AM

17 In deciding whether Whittaker used reasonable
18 care, you may consider, among other factors, the following:

19 The location of the property;

09:05AM

20 The likelihood of harm;

21 The probable seriousness of such harm;

22 Whether Whittaker knew or should have known of
23 the condition that created the risk of harm;

09:05AM

24 The difficulty of protecting against the risk of
25 such harm; and

1 The extent of Whittaker's control over the
2 condition that created the risk of harm.

3 Now let's turn to the next claim which is private
4 nuisance, and I will describe the essential factual elements
09:06AM 5 that the plaintiff must prove for this claim.

6 SCV Water claims that it suffered harm because
7 Whittaker created a nuisance. To establish this claim,
8 SCV Water must prove all of the following:

9 One, that SCV Water owned, leased, occupied, or
09:06AM 10 controlled the property, namely, wells;

11 Two, that Whittaker, by acting or failing to act,
12 created a condition or permitted a condition to exist that:

13 A, was harmful to health; or

14 B, was indecent or offensive to the senses; or

09:06AM 15 C, was an obstruction to the free use of property
16 so as to interfere with the comfortable enjoyment of life or
17 property.

18 Three, that:

19 A, Whittaker's conduct in acting or failing to
09:07AM 20 act was intentional and unreasonable or unintentional but
21 negligent or reckless; or

22 B, the condition that Whittaker created or
23 permitted to exist was the result of an abnormally dangerous
24 activity;

09:07AM 25 Element four, that this condition substantially

1 interfered with SCV Water's use or enjoyment of its land;

2 Five, that an ordinary person would reasonably be
3 annoyed or disturbed by Whittaker's conduct;

4 Six, that SCV Water did not consent to
09:07AM 5 Whittaker's conduct;

6 Seven, that SCV Water was harmed;

7 Eight, that Whittaker's conduct was a substantial
8 factor in causing SCV Water's harm; and

9 Nine, that the seriousness of the harm outweighs
09:08AM 10 the public benefit of Whittaker's conduct.

11 Now, in determining whether the seriousness of
12 the harm to SCV Water outweighs the public benefit of
13 Whittaker's conduct, you should consider a number of factors.

14 To determine the seriousness of the harm that
09:08AM 15 SCV Water suffered, you should consider the following:

16 One, the extent of the harm, meaning how much the
17 condition Whittaker caused interfered with SCV Water's use or
18 enjoyment of its property and how long that interference
19 lasted;

09:08AM 20 Two, the character of the harm, that is, whether
21 the harm involved a loss from the destruction or impairment of
22 physical things that SCV Water was using or personal discomfort
23 or annoyance;

24 Three, the value that society places on the type
09:09AM 25 of use or enjoyment invaded. The greater the social value of

1 the particular type of use or enjoyment of land that is
2 invaded, the greater is the seriousness of the harm from the
3 invasion;

09:09AM 4 Four, the suitability of the type of use or
5 enjoyment invaded to the nature of the locality. The nature of
6 the locality is based on the primary kind of activity at that
7 location, such as residential, industrial, or other activity;

8 Five, the extent of the burden, such as expense
9 and inconvenience, placed on SCV Water to avoid the harm.

09:09AM 10 Now, to determine the public benefit of
11 Whittaker's conduct, you should consider:

12 One, the value that society places on the primary
13 purpose of the conduct that caused the interference. The
14 primary purpose of the conduct means Whittaker's main objective
09:09AM 15 for engaging in the conduct. How much social value a
16 particular purpose has depends on how much its achievement
17 generally advances or protects the public good;

18 Two, the suitability of the conduct that caused
19 the interference to the nature of the locality. The
09:10AM 20 suitability of the conduct depends upon its compatibility to
21 the primary activities carried on in the locality;

22 Three, the practicability or impracticality of
23 preventing or avoiding the invasion.

24 Now, SCV Water claims that Whittaker unreasonably
09:10AM 25 failed to put an end to an artificial condition on Whittaker's

1 land that was a private nuisance.

2 To establish this claim, in addition to proving
3 that the condition created a nuisance, SCV Water must also
4 prove all of the following:

09:10AM 5 One, that Whittaker was in possession of the land
6 where the artificial condition existed;

7 Two, that Whittaker knew or should have known of
8 the condition and that it created a nuisance or an unreasonable
9 risk of nuisance;

09:11AM 10 Three, that Whittaker knew or should have known
11 that SCV Water did not consent to the condition; and

12 Four, that after a reasonable opportunity,
13 Whittaker failed to take reasonable steps to put an end to the
14 condition or to protect SCV Water from the nuisance.

09:11AM 15 Now we go to the next claim, which is public
16 nuisance.

17 So we just went through private nuisance, which
18 is a claim, and public nuisance is a separate claim. And now
19 we go to public nuisance.

09:11AM 20 SCV Water claims that it suffered harm because
21 Whittaker created a nuisance. To establish this claim,
22 SCV Water must prove all of the following:

23 One, that Whittaker, by acting or failing to act,
24 created a condition or permitted a condition to exist that:

09:11AM 25 A, was harmful to health; or

1 B, was indecent or offensive to the senses; or
2 C, was an obstruction to the free use of property
3 so as to interfere with the comfortable enjoyment of life or
4 property.

09:12AM

5 Two, that the condition affected a substantial
6 number of people at the same time;

7 Three, that an ordinary person would be
8 reasonably annoyed or disturbed by the condition;

09:12AM

9 Four, that the seriousness of the harm outweighs
10 the social utility of Whittaker's conduct;

11 Five, that SCV Water did not consent to
12 Whittaker's conduct;

09:12AM

13 Six, that SCV Water suffered harm that was
14 different from the type of harm suffered by the general public;
15 and

16 Seven, that Whittaker's conduct was a substantial
17 factor in causing SCV Water's harm.

18 Now we get to the fourth claim, Trespass.

09:13AM

19 SCV Water claims that Whittaker trespassed on its
20 property. To establish this claim, SCV Water must prove all of
21 the following:

22 One, that SCV Water owned, leased, occupied, or
23 controlled the property;

09:13AM

24 Two, that Whittaker either intentionally,
25 recklessly, or, although not intending to do so, negligently

1 caused perchlorate, TCE, and/or PCE to enter SCV Water's
2 property;

3 Three, that SCV Water did not give permission for
4 the entry;

09:13AM 5 Four, that SCV Water was harmed; and

6 Five, that Whittaker's conduct was a substantial
7 factor in causing SCV Water harm.

8 Entry can be on, above, or below the surface of
9 the land.

09:13AM 10 Now, you may consider customs or practices in the
11 community at the time in deciding whether SCV Water Agency and
12 Whittaker acted reasonably. Customs and practices do not
13 necessarily determine what a reasonable person would have done
14 in their situation. They are only factors for you to consider.

09:14AM 15 Following a custom or practice does not excuse
16 conduct that is unreasonable. You should consider whether the
17 custom or practice itself is reasonable.

18 Now, with regard to these claims, the plaintiff,
19 SCV Water, has the burden of proof by a preponderance of the
09:14AM 20 evidence. Now we're going to turn to some affirmative
21 defenses.

22 And as to an affirmative defense, the burden of
23 proof by a preponderance of the evidence belongs to Whittaker.

24 And the first is something called contributory or
09:14AM 25 comparative fault.

1 Whittaker claims that SCV Water's own negligence
2 contributed to its harm. To succeed on this claim, Whittaker
3 must prove both of the following:

09:15AM 4 That SCV Water was negligent and that SCV Water's
5 negligence was a substantial factor in causing its harm.

6 If Whittaker proves the above, SCV Water's
7 damages are reduced by your determination of the percentage of
8 SCV Water's responsibility. I will calculate the actual
9 reduction.

09:15AM 10 And now something called "apportionment of
11 responsibility," which is also an affirmative defense.

12 Whittaker claims that the negligence and fault of
13 Saugus Industrial Center, abbreviated SIC, contributed to
14 SCV Water's harm. To succeed on this claim, Whittaker must
09:15AM 15 prove both of the following:

16 One, that SIC was negligent or at fault; and,
17 Two, that the negligence or fault of SIC was a
18 substantial factor in causing SCV Water's harm.

19 If you find the negligence or fault of more than
09:16AM 20 one person was a substantial factor in causing SCV Water's
21 harm, you must then decide how much responsibility each has by
22 assigning percentages of responsibility to each person listed
23 on the verdict form.

24 So you're going to get a verdict form which will
09:16AM 25 ask you a number of questions, and it will give you direction.

1 So as to this claim, if the claim is negligence, you will
2 answer the Question 1 and then it will tell you what to do
3 depending upon how you answer. And that's what the special
4 verdict form is. It asks you questions and it gives you
09:16AM 5 direction on how to fill out the form, and you provide what
6 your responses are, which is ultimately your verdict in the
7 case.

8 And each of the lawyers will undoubtedly go
9 through that in more detail. But since I'm mentioning the
09:16AM 10 verdict form and you're wondering, that's what I'm referring
11 to.

12 Now, back onto this instruction. The percentages
13 must total 100 percent.

14 So let me just read -- since I diverged, let me
09:17AM 15 read the prior paragraph, and then I will read this next
16 paragraph that I was just starting.

17 If you find that the negligence of fault of more
18 than one person was a substantial factor in causing SCV Water's
19 harm, you must then decide how much responsibility each has by
09:17AM 20 assigning percentages of responsibility to each person listed
21 on the verdict form.

22 The percentages must total 100 percent. You will
23 make a separate finding of SCV Water's total damages, if any.
24 In determining an amount of damages, you should not consider
09:17AM 25 any person's assigned percentage of responsibility. A person

1 can mean an individual or a business entity.

2 Now I'm going to provide you with instructions
3 concerning damages, and we will begin with a general
4 introduction to tort damages. And when I say "tort damages,"
09:17AM 5 these claims fall under the legal umbrella of what we refer to
6 as torts.

7 If you decide that SCV Water has proved its claim
8 against Whittaker, you also must decide how much money will
9 reasonably compensate SCV Water for the harm.

09:18AM 10 This compensation is called damages. The amount
11 of damages must include an award for each item of harm that was
12 caused by Whittaker's wrongful conduct even if the particular
13 harm could not have been anticipated.

14 SCV Water does not have to prove the exact amount
09:18AM 15 of damages that will provide reasonable compensation for the
16 harm. However, you must not speculate or guess in awarding
17 damages.

18 Now, to recover damages for harm to property,
19 SCV Water must prove the reasonable cost of repairing the harm.

09:18AM 20 To determine whether the cost of repairing the harm is
21 reasonable, you must decide if there is a reasonable
22 relationship between the cost of repair and the harm caused by
23 Whittaker's conduct. You must consider the expense and time
24 involved to restore the property to its original condition
09:19AM 25 compared to the value of the property.

1 Once you determine how much it costs or how much
2 it might cost to restore the groundwater under SCV Water's
3 property to its original state, you must then determine whether
4 the cost to restore SCV Water's property to its original
09:19AM 5 condition are reasonable in light of all the competing
6 interests set forth in the evidence presented by the parties.

7 Now, to recover damages for loss of use,
8 SCV Water must prove the reasonable cost to purchase
9 replacement water for the time when it could not use its own
09:20AM 10 wells.

11 For plaintiff to recover restoration damages on
12 its trespass and/or nuisance claims, it must first prove that
13 it has a possessory interest in the property that is damaged.
14 Plaintiff contends it has two separate property interests, an
09:20AM 15 appropriative interest in groundwater, allowing it to extract
16 groundwater to sell for drinking water and, separately, that it
17 owns an interest in the land, including the surface water and
18 the subsurface on which its supply wells are located.

19 Now, appropriative right, I will provide you with
09:20AM 20 some additional information about that.

21 So plaintiff has no actual property interests in
22 the groundwater but only a right to use the water. This is
23 called an appropriative right.

24 In California, the groundwater belongs to and is
09:21AM 25 owned by the state, not any person or entity. Because

1 plaintiff's appropriative right is based only upon its right to
2 use the water, plaintiff does not obtain a possessory interest
3 in the groundwater until it is extracted from the ground for
4 use as drinking water. For plaintiff to recover damages for an
09:21AM 5 injury to its interest in the use of the groundwater, plaintiff
6 must prove that the injury took place after the water was
7 extracted from its wells.

8 Interest in land. Plaintiff also contends that
9 it owns an interest in land upon which its wells are located,
09:21AM 10 including the surface property and the subsurface.

11 Now, you must award damages in an amount that
12 fully compensates SCV Water for its damages in accordance with
13 the instructions that I'm giving you. You may not speculate or
14 consider any other possible sources of benefit that SCV Water
09:22AM 15 may have received. After you have returned your verdict, the
16 Court will make whatever adjustments are necessary in this
17 regard.

18 Now, you will hear closing arguments from both
19 counsel shortly. And the arguments of the attorneys are not
09:22AM 20 evidence of damages. Your award must be based on your reasoned
21 judgment applied to the testimony of the witnesses and the
22 other evidence that has been admitted during trial.

23 Now, you may recall that, during jury selection,
24 I made reference to the fact that the plaintiff, SCV Water, was
09:22AM 25 claiming not just compensatory damages but punitive damages.

1 And so, if you decide that Whittaker's conduct caused SCV Water
2 harm, you must decide whether the conduct justifies an award of
3 punitive damages. The amount, if any, of punitive damages will
4 be an issue decided later.

09:22AM

5 At this time, you must decide whether SCV Water
6 has proved that Whittaker engaged in that conduct with malice,
7 oppression, or fraud. To do this, SCV Water must prove one of
8 the following by clear and convincing evidence.

09:23AM

9 So you are now hearing a different burden of
10 proof than you have previously heard. With regard to the
11 claims that the plaintiff has to prove and the affirmative
12 defenses, that burden of proof is called preponderance of the
13 evidence.

09:23AM

14 With regard to the issue of punitive damages, it
15 has its own burden of proof, which is a higher burden of proof,
16 which is called clear and convincing evidence. And the
17 plaintiff shoulders that burden. And I will explain to you
18 what clear and convincing evidence is or what the burden is
19 after I give you this punitive damage instruction.

09:23AM

20 So this is what SCV must prove by clear and
21 convincing evidence:

09:24AM

22 One, that the conduct constituting malice,
23 oppression, or fraud was committed by one or more officers,
24 directors, or managing agents of Whittaker who acted on behalf
25 of Whittaker; or

1 Two, that the conduct constituting malice,
2 oppression, or fraud was authorized by one or more officers,
3 directors, or managers -- strike that -- or managing agents of
4 Whittaker; or

09:24AM

5 That one or more officers, directors, or managing
6 agents of Whittaker knew of the conduct constituting malice,
7 oppression, or fraud and adopted or approved that conduct after
8 it occurred.

09:24AM

9 Now, I'm going to give you definitions, if you
10 will, concerning some of these concepts, beginning with malice.

11 "Malice" means that Whittaker acted with intent
12 to cause injury or that Whittaker's conduct was despicable and
13 was done with a willful and knowing disregard of the rights or
14 safety of another.

09:24AM

15 A person acts with knowing disregard when the
16 person is aware of the probable dangerous consequences of the
17 person's conduct and deliberately fails to avoid those
18 consequences.

09:25AM

19 "Oppression" means that Whittaker's conduct was
20 despicable and subjected SCV Water to cruel and unjust hardship
21 in knowing disregard of its rights.

22 Despicable conduct is conduct that is so vile,
23 base, or contemptible that it would be looked down on and
24 despised by reasonable people.

09:25AM

25 "Fraud" means that Whittaker intentionally

1 misrepresented or concealed a material fact and did so
2 intending to harm SCV Water.

3 An employee is a managing agent if the person
4 exercises substantial independent authority and judgment in the
09:25AM 5 person's corporate decision-making such that the person's
6 decisions ultimately determine corporate policy.

7 And now the instruction on what clear and
8 convincing evidence means.

9 When a party has the burden of proving any claim
09:25AM 10 or defense by clear and convincing evidence, it means that the
11 party must present evidence that leaves you with a firm belief
12 or conviction that it is highly probable that the factual
13 contentions of the claim or defense are true.

14 This is a higher standard of proof than proof by
09:26AM 15 a preponderance of the evidence, but it does not require proof
16 beyond a reasonable doubt.

17 Now, I am going to provide you at this point with
18 some instructions concerning -- or that will guide your
19 deliberations. And the first is that, once you have heard all
09:26AM 20 of the evidence and you assemble in the jury room, the first
21 thing that you should do before you even begin your
22 deliberations is elect one member of the jury as the presiding
23 juror. The presiding juror will preside over the deliberations
24 and serve as the spokesperson for the jury in court.

09:26AM 25 That person, however, will not be asked, as you

1 see on TV or in movies, to actually read the verdict itself.
2 That will be done by my courtroom deputy. And I tell you that
3 because sometimes someone -- some people might not want to
4 serve as a foreperson, not because they don't want to do it
09:27AM 5 inside the deliberation room, but they don't want to have to
6 announce the verdict in open court. Don't let that dissuade
7 you. You won't be asked to do that task.

8 You shall diligently strive to reach agreement
9 with all of the other jurors if you can do so. Your verdict
09:27AM 10 must be unanimous.

11 Each of you must decide the case for yourself,
12 but you should do so only after you have considered all of the
13 evidence, discussed it fully with the other jurors, and
14 listened to their views.

09:27AM 15 It is important that you attempt to reach a
16 unanimous verdict, but, of course, only if each of you can do
17 so after having made your own conscientious decision. Do not
18 be unwilling -- excuse me -- do not be unwilling to change your
19 opinion if the discussion persuades you that you should. But
09:28AM 20 do not come to a decision simply because other jurors think it
21 is right or change an honest belief about the weight and effect
22 of the evidence simply to reach a verdict.

23 Because you must base your verdict only on the
24 evidence received in the case and on these instructions, I want
09:28AM 25 to remind you that you must not be exposed to any other

1 information about the case or to the issues it involves.

2 Except for discussing the case with your fellow
3 jurors during deliberations, I remind you do not communicate
4 with anyone in any way and do not let anyone else communicate
09:28AM 5 with you in any way about the merits of the case or anything to
6 do with it.

7 This includes discussing the case in person, in
8 writing, by phone, tablet, or computer or any other electronic
9 means via e-mail, text messaging, or any Internet chat room,
09:28AM 10 blog, website, or application, including, but not limited to,
11 Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat,
12 TikTok, or any other forms of social media.

13 This applies to communicating with your family
14 members, your employer, the media or press, and the people
09:29AM 15 involved in the trial.

16 If you are asked or approached in any way about
17 your jury service or anything about the case, you must respond
18 that you have been ordered not to discuss the matter and then
19 please report the contact to the Court.

09:29AM 20 Do not read, watch, or listen to any news or
21 media accounts or commentary about the case or anything to do
22 with it; although, I have no information that there will be
23 news reports about this case.

24 Also, please do not do any research, such as
09:29AM 25 consulting dictionaries, searching the Internet, or using other

1 reference materials, and do not make any investigation or in
2 any other way try to learn about the case on your own.

3 Also, do not visit or view any place discussed in
4 this case, and do not use Internet programs or other devices to
09:29AM 5 search for or view any place that was discussed during the
6 trial.

7 Also, do not do any research about this case, the
8 law, or the people involved, including, but not limited to, the
9 parties, the witnesses, or the lawyers until you have been
09:30AM 10 excused as jurors. If you happen to read or hear anything
11 touching on this case in the media, turn away and report it to
12 me as soon as possible.

13 These rules, as I explained to you during the
14 preliminary instructions, protect each party's right to have
09:30AM 15 this case decided only on the evidence that has been presented
16 here in court.

17 Witnesses here in court take an oath to tell the
18 truth, and the accuracy of their testimony is tested through
19 the trial process that you witnessed.

09:30AM 20 If you do any research or investigation outside
21 of the courtroom or gain any information through improper
22 communications, then your verdict may be influenced by
23 inaccurate, incomplete, or misleading information that has not
24 been tested by the trial process.

09:30AM 25 Each of the parties is entitled to a fair trial

1 by an impartial jury. And if you decide the case based on
2 information not presented in court, you will have denied the
3 parties a fair trial. Remember, you have taken an oath to
4 follow the rules, and it is very important that you follow
09:31AM 5 these rules.

6 A juror who violates these restrictions
7 jeopardizes the fairness of these proceedings. If any juror is
8 exposed to any outside information, please notify the Court
9 immediately.

09:31AM 10 Now, if it does become necessary during your
11 deliberations to communicate with me, you may send a note
12 through the bailiff, signed by your presiding juror or by one
13 or more of your members.

14 No member of the jury should ever attempt to
09:31AM 15 communicate with me except by a signed writing. I will
16 communicate with any member of the jury on anything concerning
17 the case only in writing or here in open court.

18 If you send out a question, I will consult with
19 the parties before answering it, which may take some time. So
09:31AM 20 please continue your deliberations while you await my answer to
21 your question.

22 Remember that you're not to tell anyone,
23 including me, how the jury stands numerically or otherwise
24 until after you have reached a unanimous verdict or have been
09:32AM 25 discharged. Do not disclose any vote count in any note to the

1 Court.

2 Now, a verdict form, which I have explained a
3 little bit to you, has, in fact, been prepared for you in this
4 case. And after you have reached a unanimous verdict -- or
09:32AM 5 agreement on a verdict, I should say, your presiding juror
6 should complete the verdict form according to your
7 deliberations, sign and date it, and advise the bailiff that
8 you are ready to return to the courtroom.

9 Now, that concludes the instructions that I am
09:32AM 10 going to give you. It is possible that I may give you some
11 additional instructions following the closing arguments.

12 But at this time, ladies and gentlemen, you're
13 going to hear the closing arguments. And we will begin with
14 the plaintiff, SCV Water. SCV Water is the plaintiff. They
09:33AM 15 bear the burden of proof on the claims.

16 So you're going to hear from them twice. They
17 will have an opportunity to present you with what's called an
18 opening closing argument. Then you will hear from Whittaker,
19 which will present the defense closing argument. And then you
09:33AM 20 will hear, once again and finally, from the plaintiff who will
21 present what is called a rebuttal closing argument.

22 A couple of things. I remind you that argument
23 is not evidence. What the lawyers will now do is sum up the
24 evidence. What they're allowed to do is to accurately report
09:33AM 25 to you on the evidence that you heard and argue the evidence

1 and reasonable inferences from the evidence that you heard.
2 They're not permitted to misstate the evidence.

3 If they do that and you -- your memory tells you
4 that the evidence was one thing and they're telling you
09:33AM 5 something else, disregard what they tell you. Your memory
6 controls.

7 Second thing, as I mentioned, they can argue how
8 the law intersects with the facts as they believe the facts
9 have unfolded. But again, if they tell you something about the
09:34AM 10 law that differs from the law that I have instructed you on,
11 disregard what they say that's inconsistent and follow the law
12 that I have given to you.

13 Now, with that, Mr. Richard, you may present your
14 opening closing argument.

09:34AM 15 MR. RICHARD: Thank you, Your Honor.

16 I think I'm okay here. Let's see. Thank you,
17 Your Honor.

18 Good morning, ladies and gentlemen of the jury.

19 We have learned a bit about how groundwater flows
09:34AM 20 and contamination in this case. And this is my opportunity to
21 talk to you about what some of the evidence shows. And before
22 I do that, I want to thank you for your time and attention in
23 this matter. At times, the evidence has been time-consuming,
24 perhaps, or repetitive, and that's the nature of trials.

09:35AM 25 In this case, it's -- while I thank you for your

1 time, it's important -- isn't it? -- that we take the time
2 because this issue matters. Clean drinking water. It's not
3 just that we're in a drought, but we're here talking about
4 groundwater and contamination.

09:35AM

5 And so my client, which serves that groundwater,
6 has brought claims against Whittaker for the contamination at
7 its property. And so while we have learned a bit or maybe a
8 lot about the geology and that groundwater, in fact, does flow
9 downhill, we have also learned about what corporations, in this

09:35AM

10 case Whittaker Corporation, does when it discovers
11 contamination. We have learned how it gets there. We have
12 learned about deceit, deception, delay, denial, haven't we? We
13 have seen that evidence. So I will talk about some of that
14 evidence now.

09:36AM

15 But the last thing I want is, when you retire to
16 answer the questions on the verdict form and think about what
17 happened in this case, just because I don't mention evidence,
18 please don't think, well, Mr. Richard didn't think it was
19 important. All the evidence is important. And I know you will
20 look at that when you make your decision.

09:36AM

21 But I want to start by every case -- every trial
22 has turning points, at least for me. And for me, the first
23 turning point came -- and by the way, my closing will look a
24 lot like my opening. When an attorney tells a jury this is
25 what they believe the evidence will show, that's a -- that's a

09:36AM

1 serious bond. That's a commitment. This is what I believe the
2 evidence will show.

3 So you will see some of the same evidence, but
4 we've also seen additional evidence that wasn't in my opening.
09:37AM 5 So I will be talking a bit about Whittaker's opening statement.
6 What did they tell you? Did they prove that? Because that's
7 important.

8 But, for me, after I told you what I thought the
9 evidence would show and what I think we have proven in this
09:37AM 10 case, and more, frankly, I sat down and I was surprised. There
11 was a turning point for me when Whittaker's attorney stood up
12 and told you that Whittaker takes responsibility.

13 So I'm going to start there because I think, for
14 me, this frames why we're here because I thought -- I thought
09:37AM 15 if only my clicker worked. I can do it the old-fashioned way.

16 This case is about responsibility, and that's
17 something that Whittaker's attorney told us. And I thought,
18 you know, we agreed on that. Right? We're here to hold
19 Whittaker responsible for the contamination over many decades
09:38AM 20 at its property.

21 Then he said we're responsible for the
22 perchlorate. I will say it again. Whittaker is responsible
23 for the perchlorate contamination. I thought, well, that's
24 great. Why don't you just take responsibility for the rest of
09:38AM 25 the contamination, then we can all go home. But then I

1 realized -- and the evidence tells us -- this is not true.
2 Whittaker didn't take responsibility. Whittaker hasn't taken
3 responsibility.

09:38AM 4 The evidence tells us that Whittaker only takes
5 responsibility when it's imposed, when they're sued, when
6 there's an arbitration, when there's a ruling against them.
7 They delay, they deny. The evidence told us over and over.
8 They denied responsibility for perchlorate contamination for
9 years. Then they were sued. Then they denied it for years
09:39AM 10 more.

11 So that's the context of this case, I believe.
12 And I think the evidence tells us that sometimes the attorneys
13 tell you one thing and the evidence tells you something else.
14 And always follow the evidence.

09:39AM 15 So that was a few weeks ago in their opening
16 statement.

17 So did Whittaker take responsibility? You heard
18 from Mr. Peloquin. He was the fellow who was out there, head
19 of safety. He's the fellow who led a tour in 1987 of the EPA
09:39AM 20 and the state EPA, the DTSC. And then he prepared some notes
21 to the vice president and general counsel Gordon Louttit.

22 Whittaker didn't call Mr. Louttit. They didn't
23 present him. And we will talk about jury instructions when a
24 party has -- the judge just read it for you -- a party presents
09:39AM 25 weaker evidence rather than stronger evidence. They didn't

1 present Mr. Louttit.

2 In his own words, he told Mr. Louttit, after this
3 tour, "I note that we didn't get to East Fork." That was one
4 of the landfills, the one that had the most contamination.

09:40AM 5 "Just can't imagine how that happened. Landfills did not come
6 up, slipped my mind."

7 This is the evidence we have seen in this case.
8 This is the candid kind of admission that tells us, when we
9 hear words like "despicable" or "malice" or "oppression" or
09:40AM 10 "deceit," this is the kind of corporate conduct that comes to
11 mind, isn't it?

12 And Mr. Sorsher, our first witness, the older
13 gentleman, he was there in 1987. He remembered Mr. Peloquin.
14 And he emphasized, hey, we got this memo in 1988. And they
09:40AM 15 told us, no big deal. We have three landfills. No hazardous
16 substances. No hazardous releases.

17 And I asked him, Did you rely on them, on
18 Whittaker, to tell the truth? And he said, Yes, I did. He
19 said, We thought it was innocuous based on their disclosures in
09:41AM 20 1988.

21 He went on to say he was shocked and surprised
22 because their 1988 submittal was saying how innocuous the site
23 was. And now in 1991, I get this other memo -- and I will just
24 interrupt there -- the other memo is trial Exhibit 445. It is
09:41AM 25 what is called the mystery memo. Whittaker knew about it. It

1 was prepared by their consultant Wenck. Norman Wenck, another
2 witness that Whittaker didn't bring before you.

3 I brought Mr. Sorsher into this courtroom. He
4 described -- three years later, I get this memo delivered to
09:41AM 5 me. Everybody called it the mystery memo because we weren't
6 sure who it came from. It looked similar to other documents he
7 had gotten. He had been dealing with Norm Wenck and Whittaker
8 for years, hadn't he? That's what the evidence tells us.

9 Then he gets a memo in 1991, dated June 1987
09:42AM 10 describing not three landfills, numerous landfills. Not
11 innocuous trash, pallets, metal. Hazardous waste all over the
12 site.

13 Again, that's the kind of deception and
14 despicable corporate conduct that may matter to you when you
09:42AM 15 deliberate in this matter in a bit.

16 He goes on to say, I get this other memo which is
17 saying they found all these things. I didn't correct that.
18 Sorry. They were digging this stuff up basically behind my
19 back.

09:42AM 20 Did -- President Joe Alibrandi, he met with
21 Gordon Louttit, he met with John Peloquin. He's the president.
22 Mr. Peloquin said he was the head guy. I didn't tell Joe
23 anything. Joe ran things. Did he take responsibility?

24 There was a meeting, June 17th, 1987, same date
09:43AM 25 as that mystery memo that showed up three years later. In his

1 own words, "Joe feels it is not necessary to sift the landfills
2 to the degree that we have been presently."

3 So now, this is an example of, well, what is a
4 reasonable inference when you read this? They met, they
09:43AM 5 talked, they were dealing with contamination. They started
6 going through their landfills, sifting it, let's find out
7 what's out there. And then the president of Whittaker says, I
8 don't think we need to do that. That's how I read these words.
9 But again, you'll decide. Does that mean something else? I
09:43AM 10 don't think so.

11 Then we get to, well, why? And that's something
12 in every case I ask myself. Why are we here? How did this
13 happen? Who made the decision?

14 And there's an old saying in this type of work,
09:43AM 15 follow the money. Right? And so he tells us, oh, the costs
16 were pared down from 1.8 million, which was their estimate to
17 deal with these landfills at that time, to about a third of
18 that. Oh, well, there's nothing wrong, their witnesses tell
19 us, with a corporation wanting to save some money.

09:44AM 20 Well, there is when it comes to cleaning up
21 hazardous waste sites, isn't there? You want companies, you
22 want corporations to be responsible corporate citizens in this
23 country, not to pare down in the face of hazardous
24 contamination and hope to sell the property to someone else and
09:44AM 25 make it their problem.

1 It goes on to say, "Joe made a comment to the
2 effect, if he cannot sell the property because of a
3 contamination problem, he will write off the loss and will the
4 property to the EPA or maybe Tammy Bakker. I was going to
09:44AM 5 include a picture of Tammy Faye Bakker for you, but -- and I'm
6 not sure who the modern counterpart might be. I don't know.
7 Not Britney Spears. But she was a public figure in the '80s
8 because of her husband that -- the minister.

9 And so this is, obviously -- she wasn't a serious
09:45AM 10 consideration for someone that he would will the property to
11 as a -- and neither was the EPA.

12 This gives us an insight into how Whittaker
13 viewed this at the time. Pretty cavalier, isn't it? Pretty
14 sarcastic. Big joke.

09:45AM 15 We have contamination. Let's not tell the EPA.
16 Let's not tell Alan Sorsher of the state EPA. Did President
17 Eric Lardiere take responsibility? He's here. He's been with
18 Whittaker for over 20 years. He heard his attorney say we take
19 responsibility.

09:45AM 20 So we went through dispute after dispute after
21 dispute involving perchlorate, involving an actual agreement
22 between Whittaker and my client, the water agency. So I asked
23 him, fair to say that, even after the water agencies sued
24 Whittaker, Whittaker denied any liability for the perchlorate
09:46AM 25 contamination?

1 Well, we did eventually settle. We went through
2 this. We heard this. Eventually taking responsibility after
3 you have been sued, after a federal judge has ruled against
4 you, doesn't quite mean what counsel suggested, I would submit,
09:46AM 5 we take responsibility.

6 We went through a number of the disputes that
7 arose even after that settlement agreement. He talked about a
8 well at Magic Mountain. He admitted they paid over \$8 million
9 after the water agency filed an arbitration against him. He
09:46AM 10 talked about another dispute to refurbish -- costs on some of
11 the vessels, those big treatment vessels. They paid after a
12 cost consultant arbitration.

13 He talked about V-201. We've had a lot of
14 testimony about that well. Shut down in 2010. It's subject to
09:46AM 15 the 2007 settlement agreement.

16 You heard testimony from Dan Masnada himself.
17 Yeah, I wrote him a couple days before Christmas 2014 and then
18 I called him. And he described exactly where he was driving.
19 Gets ahold of Mr. Lardiere and he's pretty hot under the
09:47AM 20 collar. He didn't want to share precisely the words he used.

21 But suffice it to say, years had gone by. And
22 when asked about that phone call, Mr. Lardiere couldn't quite
23 remember the phone call, but, again, well, we did eventually
24 agree.

09:47AM 25 Well V-205, you heard this evidence. Again,

1 Mr. Lardiere testified in this proceeding, he gets a letter, a
2 formal notice under the 2007 settlement agreement. Hey, we've
3 had a detection. It's over the limit set forth in our
4 agreement. You're required to take these steps to meet and
09:47AM 5 agree to reimburse.

6 And he says -- this is Mr. Matt Stone writing a
7 formal request, asking Whittaker to accept responsibility under
8 the agreement to do what? Quote, "Reimburse SCVWA for all past
9 and future costs to treat perchlorate contamination and other
09:48AM 10 contaminants released at the Whittaker site as necessary to
11 restore Well V-205 as a water production well."

12 Seems like a pretty clear request. We have an
13 agreement, there's perchlorate contamination. He received no
14 response to that notification sent seven weeks ago. This is
09:48AM 15 from an e-mail he wrote in May, and there's still no agreement.

16 And then you heard testimony from their longtime
17 consultant just yesterday and the day before, well, we were
18 waiting for them to give us something. You didn't cite to
19 anything. There's no document he presented to you. It's just
09:48AM 20 another excuse.

21 We got a formal notification, and I talked to
22 Mr. Lardiere. And we were going to provide a response, but we
23 were waiting. Well, where is the letter that says that? Total
24 failure of proof on that. Just another excuse. They certainly
09:49AM 25 didn't take responsibility, and they still haven't. There is

1 still no agreement to provide perchlorate treatment at
2 Well V-205. That's one of the claims in this case.

3 And then you heard about this other well,
4 Well Q2. There was just a dispute earlier this year where,
09:49AM 5 again, as they are here -- you heard the judge. One of the
6 issues is, oh, there's been negligence by the water agency. We
7 shouldn't have to pay. The water agency should have done
8 something differently. Very similar issue to this arbitration
9 earlier this year, as you heard.

09:49AM 10 MR. BLUM: Objection, Your Honor. There is no
11 facts supporting that assertion.

12 MR. RICHARD: Other than Mr. Lardiere's
13 testimony.

14 THE COURT: All right. Please, when there is an
09:49AM 15 objection, you need to wait until the Court rules.

16 The objection is overruled.

17 MR. RICHARD: So we heard Mr. Lardiere describe
18 this proceeding. You heard Mr. Simpson just a couple days ago.
19 Yeah, I testified in that proceeding.

09:50AM 20 And just so we're clear, Mr. Lardiere sat in that
21 chair and said that was the arbitration that I said we lost.
22 He said it more than once.

23 Whittaker was ordered to pay for a containment
24 study. You heard testimony on that. Replacement water and the
09:50AM 25 treatment facility.

1 So that was a litany of disputes where every time
2 there was an issue for perchlorate contamination, there was
3 delay, denial, and excuses. And yet this case is about taking
4 responsibility.

09:50AM 5 And so one of the claims we just heard about from
6 the Court's instruction -- and you will have a hard copy of
7 these instructions -- is negligence. And this sets forth, you
8 know, what we expect of citizens, including corporate citizens.

9 Negligence is the failure to use reasonable care
09:51AM 10 to prevent harm to oneself or to others. A person can be
11 negligent by acting or by failing to act. And these principles
12 have special application to the evidence we've heard in this
13 case.

14 Not only was there widespread dumping -- and we
09:51AM 15 will go through some of that evidence, including of PCE and
16 solvents -- there was a failure to act -- wasn't there? -- in
17 the early '80s when they started looking into the extent of
18 their contamination.

19 So it goes on to say, "A person is negligent if
09:51AM 20 that person does something that a reasonably careful person
21 would not do in the same situation or fails to do something
22 that a reasonably careful person would do."

23 And then there's a number of factors that you
24 consider. And again, I think these factors apply very clearly
09:51AM 25 to the evidence that you will be discussing when you retire to

1 the jury room.

2 Quote, "A person who owns property is negligent
3 if that person fails to use reasonable care to keep the
4 property in a reasonably safe condition." And we will go
09:52AM 5 through some of the evidence that tells us that they failed to
6 do that.

7 "A person who owns property must use reasonable
8 care to discover any unsafe conditions." Well, here, not
9 only -- they learned of unsafe conditions, didn't they? They
09:52AM 10 hired that geologist we'll talk about, Bob Bean, in 1982.

11 Oh, you have an impoundment with contamination
12 from chlorinated solvents and it's overflowing. That
13 creates -- brings to mind a certain image. I have this
14 overflowing impoundment, 32,000 gallons that is now being used
09:52AM 15 for well beyond its original purpose. That's in writing. We
16 saw that. I think it's Exhibit 25. We will get to that. So
17 these factors will help guide you.

18 But we know. We know. The evidence tells us --
19 doesn't it? -- that Whittaker wasn't just negligent. They were
09:53AM 20 reckless. They were reckless with these dangerous chemicals at
21 their property, both before 1980 and after 1980.

22 And as the Court instructed you, this idea that
23 they have no liability of the chlorinated solvents that got
24 into the ground before 1967 is not true. They're responsible
09:53AM 25 back to 1943.

1 So I'm not going to go through all these factors
2 at this time. You will have those instructions.

3 But let's look at what they knew. Right? That's
4 what the negligence instruction says. Were they reasonable?

09:53AM 5 Well, their own documents tell us -- this is that
6 memo, Exhibit 25, from Bob Bean. This is back in 1982. He
7 comes out, he does a -- walks around the property, talks to
8 Jim Jisa, who you heard the deposition read from yesterday. He
9 tells him, there's almost certainly the potential for migration
09:54AM 10 of hazardous waste or hazardous waste constituents.

11 According to Jim Jisa, the Whittaker fellow that
12 you heard from yesterday in that deposition read, there had
13 been liner breaks. Liner breaks in what? In this
14 32,000-gallon impoundment that was being used for more
09:54AM 15 chemicals and more runoff than it should have been used for, as
16 set forth in this exhibit.

17 The hazardous wastewater would move essentially
18 straight down through those liner breaks. The wastewater would
19 then move downgradient. That's a term we have heard in this
09:54AM 20 case; right? For groundwater, travels from higher elevations
21 to lower elevations -- in that aquifer.

22 In the case of both sumps, both of these
23 impoundments, they're referred to as Building 317 and
24 Building 342. And they come up over and over again as the
09:54AM 25 regulators figure out what Whittaker knew back in 1982.

1 This would almost certainly be in a westerly
2 direction. Again, didn't need a whole bunch of studies. They
3 knew. You've got a liner break or it's overflowing, it's going
4 to go straight down, get in the aquifer, and go west.

09:55AM

5 They knew of the risks of even mild chronic
6 exposure to these solvents because these solvents were used in
7 what? Well, one of the big uses of them at this site was for
8 their degreasers; right? You have ammunition that comes packed
9 in grease. You have equipment that needs to have the grease

09:55AM

10 cleaned off it. And you put it through these degreasers. And
11 degreasers have a vapor that has some of this -- some of these
12 solvents. They have sludge that's created. We saw no evidence
13 as to where all that sludge went, did we?

09:55AM

14 So this is back in 1979. The vapor degreaser
15 outside the machine shop -- and this is another -- this is from
16 Mr. Peloquin to Zoyd Luce, the two Whittaker folks that we
17 heard from in their deposition reads. "The vapor degreaser
18 outside the machine shop needs fail-safe. Acute exposure to
19 the solvent vapors can cause death. Chronic mild exposure to
20 the vapors has been known to cause permanent liver damage."

09:56AM

21 And this was well-known before 1979, as Dr. Hughto went through
22 and explained the history of use of chlorinated solvents and
23 surface contamination in groundwater.

09:56AM

24 I'm just going to jump ahead. There was a lot of
25 intervening evidence from the regulators before 2002. But in

1 2002, we see the same reference to health effects. TCE is
2 classified as what? A probable human carcinogen. Can cause
3 reproductive defects, tumorigenic effects, chloracne, and what?
4 And liver damage. It's been known a long time. Whittaker has
09:56AM 5 had a safety -- knew it in 1979. They were reminded of it in
6 2002.

7 And the evidence tells us that they knew or
8 certainly should have known of the risks of dumping waste on
9 the ground. I say groundwater. We will keep going.

09:57AM 10 And Dr. Hughto went through some of this history
11 for us. He talked about a study in 1899, that manufacturing
12 processes can create pollution of nearby wells. There were
13 early laws in California he talked about. There was a special
14 concern going back to the '40s and '50s in Southern California
09:57AM 15 about groundwater contamination.

16 And he talked about -- Dr. Hughto described that
17 the USGS, the United States Geological Survey -- he's actually
18 quite an authority on this, and there was quite a bit of
19 publication in the 1960s. He described and read for us a
09:58AM 20 portion of this 1899 study. Some of the nuances and potential
21 liabilities that he identified -- they're talking about the
22 author of this study -- was pollution of private wells adjacent
23 to a property, pollution of state streams, pollution of rivers
24 used for water supply in the cities, an emission of noxious
09:58AM 25 fumes.

1 In the 1940s, the propensity of industrial
2 wastes, including chlorinated solvents, to contaminate
3 groundwater was understood in the 1940s in Southern California.
4 This understanding was not limited to a small group of
09:58AM 5 specialists but extended to regulators, industry, and the
6 interested public.

7 That testimony stands undisputed, doesn't it?
8 Mr. Blum for Whittaker talked about another expert that he said
9 you would hear from. He mentioned him by name, Gaynor Dawson,
09:58AM 10 and we never heard from him. So this evidence is true, and it
11 stands uncontested.

12 Dr. Hughto went through a well-known law in
13 California and the commission giving rise to that law back in
14 1949. "Industrial wastes discharged onto land can reach
09:59AM 15 underground waters where dilution occurs so slowly that the
16 effects are always long-lasting and in some places practically
17 permanent pollution." That was his testimony on November 18th.

18 1953, he talked about this and read this into the
19 record. Pollution of underground water -- underground water is
09:59AM 20 more serious than that of surface water because subterranean
21 water movement is slow. And he was citing to another journal.

22 So while we don't have evidence that Whittaker,
23 you know, read the Dickey law in 1949 or the other laws, you
24 just heard the judge instruct that ignorance of the law is no
09:59AM 25 excuse, something I think we all learned somewhere along the

1 way.

2 But in addition to the history, especially in
3 Southern California, of an awareness that contamination on the
4 ground, especially massive contamination -- the tremendous
10:00AM 5 amounts of TCE and PCE that were used here, we don't have the
6 records of how much they purchased or when they purchased it or
7 when they stored it or how they disposed of it. But we do have
8 the evidence of hundreds of thousands of pounds being
9 identified, much of which has been removed, maybe

10 100,000 pounds, but much of which has not been removed.

11 So this wasn't, you know, someone taking a cup of
12 something and dumping it on the ground. This was industrial
13 practices. They should have been more careful. That's what
14 the evidence tells us.

10:00AM 15 But we also have their own testimony, their own
16 documents. How do we know that Whittaker knew it was not
17 supposed to dump waste on the ground? Well, they told us,
18 didn't they? We did not allow people. It wasn't part of our
19 policy to just dump things. It wouldn't have been safe. That
10:01AM 20 was read, I believe, yesterday from Mr. Zoyd Luce.

21 Did Whittaker have a policy against dumping on
22 the ground? Yes. Did they violate their own policy against
23 dumping on the ground? Yes. And again, they tell us in their
24 own words -- they actually use the word "dumped." Types of
10:01AM 25 materials being dumped on ground by building location. This is

1 Exhibit 205.

2 It talks about 29 sites just in this one memo.
3 And he names them. Building 317, reference to
4 perchloroethylene, PCE. The auto shop with solvents, the burn
10:01AM 5 pits. What ended up in the burn pit? All chemicals. So
6 that -- as Dr. Hughto explained, four specific references out
7 of the 29 sites to PCE being dumped on the ground. And then
8 the catch-all burn pit areas where everything in the plant, all
9 the chemicals, ended up.

10:02AM 10 You know, there was some testimony that was read
11 yesterday and it brought to mind an image where you have this
12 big burn pit. And then just to see what would happen, they put
13 a barrel next to it. And you heard the testimony, we came back
14 and it was incinerated. And it was almost this image of, you
10:02AM 15 know, big boys wanting to just throw things in the burn pit to
16 see what would happen or set something next to it to see what
17 would happen.

18 Well, burn pits have a way of becoming a
19 landfill, don't they? And they found a massive amount of these
10:02AM 20 chemicals in the soil at the burn pit. So if everything was
21 incinerated, you wouldn't expect to find tens of thousands of
22 pounds of these chemicals in the soil, would you?

23 And Dr. Hughto explained -- I asked him, well,
24 would dumping that sludge from the degreasing with the TCE in
10:03AM 25 it be consistent with the amount of TCE found in the burn pit?

1 And he said, yes, it would. So did the burn pit become a
2 dumping ground? This memo comes pretty close to telling us
3 that that's exactly what it became; right? He's saying we're
4 dumping certain chemicals in certain areas. Everything on the
10:03AM 5 plant ends up in the burn pit.

6 Talked about the Hula Bowl and the solvents.
7 That's one of the areas where, of course, they found these
8 solvents later.

9 Did they have reckless disposal practices? Well,
10:03AM 10 another word for reckless might be indiscriminate.
11 Indiscriminate dumping of waste to the environment was
12 occurring.

13 As I listened to Whittaker's counsel ask
14 questions of their witnesses and argue or state in opening
10:03AM 15 statement, oh, they were just being good corporate citizens.
16 Nobody knew anything until this new law, RCRA, came into effect
17 in 1976. And he said in his opening, the evidence would show
18 everything changed in 1976.

19 I think the evidence tells us that's not true.

10:04AM 20 In fact, I think the inference is, if they were dumping, even
21 after RCRA was adopted, and they were trying to get their arms
22 around it, the evidence tells us, especially given the amount
23 of materials they found in the burn pit and these other
24 landfills, they certainly didn't have better disposal
10:04AM 25 practices, better waste handling practices before this new law,

1 did they? Again Whittaker submitted no evidence of that.

2 So 1979, we need to stop this indiscriminate
3 dumping of waste to the environment. And yet the evidence
4 tells us they kept coming back to the same dumping, the same
10:04AM 5 areas, the same practices.

6 It came up with instructions for waste disposal,
7 yet those instructions have been ignored. Why? So this is a
8 good example. What makes someone negligent? Not following
9 instructions for how you should handle hazardous waste is
10:05AM 10 pretty good evidence of negligence.

11 The hog-out area, that was a mess. Sounds like
12 negligence.

13 Can't control the problem. Sounds like
14 negligence.

10:05AM 15 And then they tell us the problem is serious.
16 Again, we're not just -- this isn't a couple fellows who, you
17 know, made a mistake and, you know, dropped something and
18 didn't clean it up. The problem is serious.

19 The safety department, again, of Whittaker cannot
10:05AM 20 continue to promulgate guidelines. We draft them. We tell you
21 about them, guidelines and rules, when their execution by
22 management does not occur. Management. Mr. Peloquin,
23 Joe Alibrandi, the same folks who sat in that room in June 1987
24 and joked about the contamination. That was management at
10:06AM 25 Whittaker.

1 They had another internal inspection by
2 Mr. Peloquin. You saw this evidence. The Hula Bowl and other
3 areas were still a problem. So this is now three years after
4 they came up with those new rules in 1979.

10:06AM

5 So widespread dumping, reckless practices, not
6 following our own policies. But they knew in 1982 because they
7 hired a geologist. Hey, there are these new rules. We're
8 going to need some groundwater monitoring at this impoundment.
9 And then they hire someone. Can we get a waiver? Can we get

10:06AM

10 out of this rule? Can we avoid putting in groundwater
11 monitoring that would start to tell us how far this
12 contamination is spreading?

13 And the evidence tells us that for year after
14 year, for decades, they avoided this common sense and necessary
15 step to start putting in let's find out how far the
16 contamination has spread.

10:07AM

17 And I'm going to circle back to this point. But
18 there's a great dividing line in this case. And I'm sure it
19 will become more clear as Mr. Blum stands up and talks to you
20 about what he thinks the evidence shows.

10:07AM

21 And the dividing line is they want to say we had
22 these monitoring wells everywhere onsite and offsite and, oh,
23 the contamination disperses everywhere. So if we have one
24 monitoring well, that tells us everything that's going on. And
25 we know that's not true because the wells aren't deep enough.

10:07AM

1 The wells weren't put in soon enough. And the wells,
2 especially the offsite wells, a handful of these monitoring
3 wells, the little 2-inch wells, there's a handful. You see a
4 few dots. Onsite, over 200 monitoring wells detecting. So
10:07AM 5 there was a reason that Whittaker delayed groundwater
6 monitoring.

7 So you can't come in after the fact and say, oh,
8 the water quality data tells us exactly what's happening. That
9 would be true if you had 200 onsite wells and 200 offsite wells
10:08AM 10 in 1980 or 1985. But we don't. We don't. Those three border
11 wells that, oh, that 1,200-foot area, we've got these clusters
12 of 2-inch wells. Well, when were they put in, Dr. Hokkanen? I
13 don't know. Could it have been 2011? Maybe.

14 So on the one hand, you have data. We follow the
10:08AM 15 data. And it's almost this deception -- isn't it? -- that the
16 groundwater quality data tells us everything we need to know so
17 we don't have to look at -- what? We don't have to look at
18 where the chemicals got dumped at the site. We don't have to
19 look at groundwater direction. We don't have to look at the
10:09AM 20 contour lines.

21 So the evidence tells us and the witnesses have
22 explained this. We just heard from B.J. Lechler yesterday.
23 When you don't have complete groundwater data, when you don't
24 have the monitoring wells going down to the right aquifer, then
10:09AM 25 you look at, well, where is the water flowing? What's in the

1 water at the site and which way is it flowing? And is it
2 contaminating this groundwater basin? Yes.

3 Their expert didn't even want to calculate the
4 speed of groundwater, even though he knows how to do it and
10:09AM 5 he's done it many, many times. So that's the great divide in
6 this case, and we will go through some of the evidence.

7 Can we look at groundwater direction and we have
8 contamination at Point A and contamination at Point B and we
9 know the aquifers are connected and we know the perchlorate got
10:09AM 10 there and we know that Whittaker denied it was their
11 perchlorate for years, just like they are denying it is their
12 VOC contamination.

13 So let's go back to groundwater monitoring. And
14 again, this is not really in dispute. They knew the condition,
10:10AM 15 if it was discovered, would trigger this groundwater monitoring
16 requirement. They didn't want it. Mr. Peloquin explained how
17 expensive it could be and that regulators could make you do
18 crazy things.

19 (The video commenced playing before the jury.)

10:11AM 20 MR. RICHARD: That's Mr. Peloquin. He's kind of
21 explaining his attitude, regulators, like the EPA, if they
22 discover your hazardous waste, your hazardous contamination,
23 your many, many landfills, they can make you do crazy things,
24 like, put in groundwater monitoring and clean it up before it
10:11AM 25 spreads.

1 That's the same fellow who didn't show
2 Mr. Sorsher those landfills. That's the same fellow who wrote
3 the memo to the vice president and general counsel,
4 Gordon Louttit, who I believe Mr. Lardiere said he spoke to.
10:11AM 5 Right? That was his predecessor. He's been there 20 years.
6 He knows Gordon.

7 But that's not the only evidence. That kind of
8 sets the stage. Well, we don't want groundwater monitoring.
9 So they hired this fellow, Bob Bean. We talked about it.
10:11AM 10 There is no question that they were trying to get a waiver. No
11 one from Whittaker came in to try to explain this memo ever.

12 He tells him there's almost certainly the
13 potential for migration of hazardous waste. He tells them a
14 more complete hydrogeologic investigation could be undertaken.
10:12AM 15 "However, since the results of a complete investigation would
16 probably be negative as far as justifying a waiver on
17 monitoring wells is concerned, such an investigation is not
18 recommended," back in 1982.

19 And yet we will hear, we've heard, we will look
10:12AM 20 at the evidence again, Whittaker now comes into this court and
21 says, not us. It was the water agency. Let's blame the
22 victim. They should have done more to investigate the scope of
23 our contamination. They had the opportunity back in 1982,
24 except they knew that, if we investigate further, that will
10:12AM 25 almost be certainly negative for trying to get out of

1 groundwater monitoring.

2 That's an example of a reasonable interpretation
3 of this run-on sentence, I would submit. You will look at this
4 evidence. You will decide.

10:12AM

5 The estimated cost of a groundwater monitoring
6 system based on a proposal from International Engineering
7 Company they said was \$120,000. This is Whittaker, again, in
8 1982. They don't send that 1982 Bob Bean memo to anyone. They
9 certainly don't tell their neighbors, the water agencies.

10:13AM

10 There is no evidence that they ever gave that candid assessment
11 of you have leaks at 317, this is most certainly getting into
12 the aquifer. They don't send that to Mr. Sorsher. No evidence
13 of that.

10:13AM

14 Instead, they say we feel no benefit would be
15 derived by Bermite. Right? They're writing to the California
16 Department of Health by the installation of a groundwater
17 monitoring system at Bermite. So there really is no question
18 that they avoided it.

10:13AM

19 Then in 1985 -- and this is Exhibit 437 -- the
20 DTSC came out, looked at the one well that they used onsite at
21 Whittaker, "show recent groundwater sampling results" -- this
22 is November 1985 -- "of your facility's water well have shown
23 levels of organic contamination above the State Department of
24 Health Services action levels."

10:14AM

25 So now, this is three years after the Bob Bean

1 memo; right? I think the evidence tells us that, had they been
2 a good corporate citizen, had they taken responsibility in
3 1982, they could have really done something to stop this
4 contamination -- right? -- the flow, the plume. They could
10:14AM 5 have really done something to identify the scope of the
6 contamination. Years go by.

7 So now the Regional Water Quality Control Board
8 is coming out. "Because of this" -- right? So they find some
9 of these volatile organic compounds in their own well at
10:14AM 10 Whittaker. "Because of this you are requested to supply the
11 following information." They want to know the name and
12 quantity of all chemicals used or stored in the facility,
13 right? How much of this stuff did you guys have out there?
14 Where are your records?

10:15AM 15 "Two, present and past waste disposal practices
16 for organic liquids." Well, they certainly didn't send them
17 their memo saying we have been dumping these on the ground. We
18 have indiscriminate dumping. Management doesn't follow our
19 policies; right? All the documents we just saw. Those would
10:15AM 20 have actually been pretty good documents, wouldn't they?
21 Documents of past -- present and past waste disposal practices
22 for organic liquids. They listed the organic liquids in
23 Exhibit 205, the PCE. It's right in there.

24 "Three, the Regional Water Quality Control Board
10:15AM 25 wants a brief description of your manufacturing process and

1 byproducts or waste generated for information on all your
2 facility's active and inactive water wells."

3 So the evidence tells us we never saw this
4 information. Dr. Hughto never saw this information.

10:16AM 5 Whittaker's experts never saw this information. Where did it
6 go?

7 Well, 1986 -- this is also in evidence --
8 Whittaker was actually cited for violating these monitoring
9 wells. This didn't all start in 2002. They learned in 1982
10:16AM 10 they should be putting in groundwater monitoring. They tried
11 to avoid it. Now here we are in 1986, Exhibit 1381, USEPA
12 groundwater monitoring program. They're being cited here. The
13 code section requires the owner of a hazardous waste surface
14 impoundment, like that surface impoundment 317 that Bob Bean
10:16AM 15 looked at in 1982 that had the tear in it.

16 "The owner of a hazardous waste surface
17 impoundment to implement a groundwater monitoring program
18 capable of determining the facility's impact on the quality of
19 groundwater in the uppermost aquifer." Almost the same words
10:17AM 20 in Bob Bean's memo. It talked about the uppermost aquifer and
21 if you have a problem. And they go on. The EPA inspector came
22 out in June 1985, reviewed the files. Refers to those two
23 impoundments, Building 317, 342. "The respondent could not
24 produce any groundwater monitoring data for the facility."

10:17AM 25 Where is that? Oops. Goes on to say, "A review of the maps

1 contained in the respondent's revised part A application of
2 August 1985 does not show any monitoring wells onsite.

3 No evidence that they should have been putting in
4 monitoring wells back in the '80s? Exhibit 1381 suggests
10:17AM 5 otherwise.

6 The same notice from the EPA, all these counts of
7 various violations, again, pointed out "There were no analysis
8 records for wastes stored, treated, or disposed onsite." So
9 if, in fact, they were dumping sludge or other VOCs into the
10:18AM 10 burn pit or those other areas set forth in Exhibit 205, they
11 certainly didn't keep a record of it, did they? No record of
12 onsite disposal.

13 Whittaker also failed to, quote, "Provide
14 sufficient information to adequately characterize the hazardous
10:18AM 15 waste." They also failed to produce records. This is Count 5,
16 operating records. "They failed to produce records to the EPA
17 showing specific dates of treatment, storage, or disposal of
18 the hazardous waste or records describing the quantity of waste
19 at each hazardous waste management unit."

10:18AM 20 Now, you heard, well, wait a minute. We
21 carefully disposed of all of our wastes, and we have manifests;
22 right? And these are documents that are -- show how much waste
23 went from our facility to some offsite facility. That was the
24 promise. That was the evidence you were going to be shown.

10:19AM 25 Those were the questions they asked Dr. Hughto. Weren't these

1 manifests? They're cited back in 1986. Well, we came and
2 looked at your manifests. And what was wrong with them? Were
3 they simply missing a signature? No. The manifests -- and
4 they list, you know, five of them -- did not specify the name
10:19AM 5 of the facility to be permitted to handle the hazardous waste.

6 So this wasn't some, oh, we forgot to get
7 someone's signature. We don't even have a record of where
8 these wastes were going. That's the undisputed evidence in
9 this case. Reasonable?

10:20AM 10 So this notion that these documents that were
11 supposed to exist in 1985 and 1986 showing where the waste
12 went, Mr. Blum tried to have Dr. Hughto -- it was late in the
13 day. I remember this -- tried to change it from, oh, it's not
14 that the manifests didn't provide the name of the entity that
10:20AM 15 perhaps you were delivering or not delivering these hazardous
16 wastes to.

17 He asks, is it your understanding that the
18 signatures that were missing -- it wasn't about signatures. It
19 was about the names of who has taken our hazardous wastes.
10:20AM 20 That's what the USEPA said. Put it in a separate count in that
21 1986 document. Yet he's asking Dr. Hughto, is it your
22 understanding the signatures that were missing were from the
23 party that received the waste rather than from the generator
24 which would have been Whittaker?

10:20AM 25 It's my understanding it is the missing

1 signatures that are cited in that document were of the
2 receiving facility. So he's right that there was missing
3 information about the receiving facility. But, again, it was
4 their name. We don't even know who it was.

10:21AM

5 So then the follow-up question -- I don't know
6 why it says B, BQ. "So Whittaker did what they needed to do.
7 It was somebody else who messed up." Okay. That's the
8 suggestion throughout this case. It was somebody else. It was
9 that Saugus Industrial Center. It was somebody -- not us. It
10 was the water agency who messed up. It was someone else. Yet
11 the evidence tells us, no, it was you, Whittaker. You messed
12 up time and time again.

10:21AM

13 In 1990 -- this is Exhibit 382 -- further
14 violations regarding Building 317 impoundment -- and, again, I
15 know I'm being a little repetitive, but that is the same
16 impoundment Whittaker knew was leaking. Now, we don't know how
17 long it was leaking, but we know that Jim Jisa told Bob Bean we
18 got a leak in our 317 impoundment.

10:21AM

19 And here we are now eight years later, report of
20 violation, schedule of compliance. Talks about Building 317.
21 Talks about the Hula Bowl. Refers to Alan Sorsher. I don't
22 want to take you through this now, but it's just part of the
23 ongoing growing concern from the regulators that something is
24 terribly remiss at the Whittaker site.

10:22AM

10:22AM

25 Whittaker Corporation Bermite division failed to

1 install at least three monitoring wells hydraulically
2 downgradient. That is exactly what Mr. Hughto said. They
3 should have installed it at the time, 1982. Now here they are
4 being cited for it. "There is only one monitoring well in the
10:22AM 5 required area consequently not ensuring immediate detection."
6 Then the next paragraph refers to Building 317. "They prepared
7 a groundwater quality assessment program for the 317
8 impoundment area but -- but it is inadequate since it is
9 incapable of determining the rate and extent of migration of
10:23AM 10 hazardous waste or hazardous waste constituents in the
11 groundwater."

12 And yet miraculously with no groundwater -- with
13 no groundwater monitoring wells in the '80s -- this is 1990
14 now -- Whittaker can come in and tell you, none of this stuff
10:23AM 15 ever got offsite. I think the evidence tells us otherwise.
16 They certainly don't have the water quality data from the
17 monitoring wells that they were cited for not having back in
18 1986 and again in 1990.

19 The Hula Bowl area was apparently used as a
10:23AM 20 general dump. We have seen that evidence. That was to
21 Gordon Louttit.

22 You have Exhibit 486. That is the consent order
23 where Gordon Louttit signs on behalf of Whittaker agreeing to
24 take a number of steps. You have the 2002 substantial
10:24AM 25 engagement order which goes into detail about the chemicals and

1 the steps.

2 Now it's 20 years after Bob Bean's memo. What
3 could have been done in those 20 years? We sold the property
4 in 1999. Okay. Well, doesn't the evidence tell us, if you had
10:24AM 5 been the good corporate citizen in 1982 and started the
6 investigation and the remediation, maybe you would have gotten
7 it cleaned up. Maybe you would have told your neighbors
8 sooner. 20 years later. Now we will put in the 200 monitoring
9 wells. Delay, denial, deception. That's what the evidence
10:24AM 10 tells us.

11 So we talked about the history here and how the
12 chemicals got there and what they did when they found them.
13 The question of did the chemicals go from point A to point B
14 and get to our wells, I think the evidence is very clear on
10:25AM 15 that.

16 So how do -- one of the first questions you ask
17 is, well, what contaminants are in our wells or near our wells
18 and what contaminants are at the site? And are the aquifers
19 connected? And again, there's no question. The chemicals are
10:25AM 20 the same. The aquifers are connected. The perchlorate has
21 gotten there.

22 The experts all talked about these elevation
23 contour lines. They define groundwater flow direction
24 because -- I thought about this this morning as I was coming
10:25AM 25 into court. There's those reflecting pools outside. The water

1 goes over the edge. It's always perpendicular. Okay. That's
2 why these elevation contour lines are so important. If they go
3 like this, groundwater direction is perpendicular to those.

4 So this is one of the exhibits in this case. It
10:26AM 5 is interesting because you heard reference and you may hear
6 reference again. Well, this says Todd Groundwater on it,
7 doesn't it? Well, yes, it does. Because Ms. Stanin attached
8 it to her own report. This was entirely prepared by
9 Whittaker's consultant though -- right? -- in 2019 after
10:26AM 10 Whittaker had already been sued. It's just an example though
11 of the contour lines. But just because Ms. Todd {sic} used it,
12 she didn't draw that plume. This was Whittaker's consultant.
13 And they added the groundwater flow.

14 So there's really no dispute about that that the
10:26AM 15 groundwater flows from the site to our wells. We know that
16 why? The groundwater carrying the perchlorate got there which
17 they now admitted.

18 So I thought it was interesting when we had this
19 map up with Dr. Hokkanen and we had this high concentration
10:27AM 20 down on one edge of the Whittaker site. And of course, the
21 property boundary is just an artificial boundary; right?
22 There's no wall that goes down hundreds of feet at boundary.
23 And you see we have all these groundwater monitoring wells
24 onsite. They show huge detections of TCE, and then there's
10:27AM 25 nothing immediately offsite. There's just a handful of these

1 wells offsite at various levels.

2 So we know that contaminated groundwater did not
3 stop at the edge of the Whittaker site. Even Dr. Hokkanen
4 admitted that. And that's what's represented here. Thank you.

10:27AM

5 You have these materials in evidence in this
6 case. This just shows the groundwater flowing from those
7 contaminated areas at the Whittaker site with high TCE and that
8 those generally flow in a westerly direction. Again, as
9 Whittaker was told in 1982, there is really no dispute about

10:28AM

10 that.

11 You have seen this, that the groundwater travels
12 in these different aquifers. Sandy areas it travels faster.
13 And again, the aquifer, there's no question it is connected
14 from the Whittaker site to these wells.

10:28AM

15 Here we have an exhibit. This was, I think,
16 exhibit -- figure 42 to Dr. Hokkanen's report. But we heard
17 from the author of this, BJ Lechler. This was part of
18 Exhibit 34. He did an investigation. He's the fellow who
19 worked with the Army Corps of Engineers. Was it just yesterday
20 he testified? He's been working in this groundwater basin for
21 20 years. Very credible. Doesn't have a dog in this fight.
22 Whittaker called him. He's their witness.

10:28AM

23 And he identified very candidly groundwater flow
24 in this direction. He described exactly what he did. And he
25 identified, well, there seem to be these areas of massive TCE

10:29AM

1 and PCE at the Whittaker site, and we know where the
2 groundwater is flowing. We know the contamination left the
3 site and contaminated the aquifer and the wells drawing on that
4 aquifer.

10:29AM

5 And he pointed out in this area north of the
6 Whittaker site here no adequate offsite monitoring wells. No
7 wells in that area. And he was candid in his recommendation
8 that there ought to be. And he was asked, well, did the
9 agency -- he said, well, in my experience, it is the polluter's

10:30AM

10 obligation to pay for and make sure that -- adequate
11 characterization is the technical term, right -- that we find
12 out.

13 But the evidence tells us Whittaker is never
14 going to put in groundwater monitoring wells. Not on their own
15 site. Certainly not offsite to confirm precise or more
16 precisely where those chemicals are traveling in the
17 groundwater.

10:30AM

18 So, you know, the experts went through. Is there
19 TCE in the soil at Whittaker? Is there TCE in the groundwater?

10:30AM

20 Is it in our wells? Are the aquifers connected? Yes. Yes.
21 Yes. Is there perchlorate in the soil? Is there perchlorate
22 in the groundwater? Is there perchlorate in our client's
23 groundwater wells? Yes. Yes. Yes. That tells us that the
24 TCE and PCE in my client's -- as they extract that water from
10:30AM 25 the groundwater, that it contains chemicals from Whittaker.

1 Now, one of the -- I will call it excuses -- that
2 we have heard about and may or may not hear more about -- but
3 it was a big deal in opening statement -- the water agency
4 failed to investigate other sources; right? They would rather
5 litigate than investigate. That was the claim. That was the
6 promise that Whittaker was going to prove to you. And if they
7 came up short, as the evidence tells us they did, then this
8 excuse should be rejected, shouldn't it?

9 So in opening, now, the evidence is going to show
10 that they have done no investigation. This was the promise.
11 No investigation, even though employees, the head of their
12 laboratory has looked at results and said, wait a minute. This
13 can't come from Whittaker. The numbers are just too high.

14 He told you plaintiff has taken the position to
15 litigate this case rather than investigate. No investigation
16 of VOC detections at the turnouts. They went heavy on this,
17 the turnouts. Never investigated. High detections. The only
18 reasonable assumption to draw is that there is a source of
19 VOCs, particularly TCE and PCE, that is entering their system
20 that they -- oops. I didn't fix that one either -- just don't
21 want to find.

22 And they called the statistician, the fellow with
23 all the dots. Didn't actually do any probability analysis;
24 right? Didn't do what statisticians normally do. Can't tell
25 you if it's more likely here, more likely there, didn't count

1 up the whole population. But he was their guy who was going to
2 come in and show to fulfill that promise that counsel made to
3 you that there were these spikes and the water agency did not
4 investigate.

10:32AM

5 So they called the witness. He sat in that
6 chair. I think -- and he presented this set of data. He
7 called it the most extreme example. These extreme points in
8 2012. And this is a theme for their witnesses. Well, I didn't
9 see any evidence of this, therefore, I'm going to draw this
10 conclusion.

10:33AM

11 Dr. Steffey emphasized -- and counsel told you --
12 he looked at every piece of evidence and turnout detections.
13 He testified, in my review of the documents, I didn't see any
14 indication or any reports of an agency investigation of
15 anomalies.

10:33AM

16 And I was thinking, wow, you know, it's so
17 similar to their other experts. And if we stopped there, you
18 have a fellow come in, he puts dots on a page, he's trying to
19 tell you, see, you can draw some conclusion from that, I didn't
20 see any investigation, therefore, none occurred. And had it
21 stopped there, wow, there was no investigation.

10:33AM

22 So what does the evidence tell us? Was that
23 true? That was one of Mr. Blum's favorite questions. Was that
24 true in your deposition? Was that true?

10:34AM

25 I was actually a little surprised, to be honest,

1 Dr. Steffey sitting there. So I asked him, so you don't --
2 even today -- what was this, Monday? Even today you don't know
3 that the water agency investigated and found an abandoned pipe
4 and capped it off in 2012? No, I don't believe I know that.

10:34AM

5 That surprised me. That was another turning point for me
6 because there was a report prepared by Jim Leserman. You
7 haven't seen this photo, I asked him, of some folks working on
8 looks like a big flange with a bunch of bolts? You've never
9 seen this photo before today? I have not seen this photo

10:34AM

10 before today.

11 So there was an investigation, those most extreme
12 detections, both Mr. Leserman testified, the head of operations
13 Mike Alvord -- he's the fellow who talked about the hydraulics
14 and there's not perfect mixing and you have to understand
15 what's going on in our distribution -- testified about this
16 investigation. There was a report done.

10:34AM

17 Again, this is -- Dr. Steffey was asked, so you
18 don't know if, in fact, there was an investigation? If they
19 did, there was no documentation of that. In the materials I
20 reviewed, no one gave that to me.

10:35AM

21 And yet we know they prepared a detailed report.
22 We know there was testimony on it. We have seen the photos.
23 They investigated. They identified the issue. And it wasn't
24 getting into their system. There's a tap there. You heard
25 Mr. Alvord talk about, well, there's a tap where we get our

10:35AM

1 water sample. And it was so close to this contaminated soil
2 from this pipeline that wasn't closed off that, when we closed
3 it off -- first they changed the tap.

4 Remember that? It was brass and they changed it
10:35AM 5 to steel or something. So they thought maybe something was
6 collecting on the tap. And when we turned off that turnout and
7 turned it back on, and we went through all that testimony. So
8 they investigated. They found it. And the problem went away.
9 And yet Whittaker told you none of that happened. They would

10:36AM 10 rather litigate than investigate except for the one most
11 extreme problem which they did investigate and fix.

12 There is Mr. Alvord.

13 So their first excuse, we failed to investigate,
14 I think the evidence tells us who failed to investigate in this
10:36AM 15 case time and time again.

16 Travel time. Again, opening statement you were
17 told that their own expert -- water agency's own expert
18 Phyllis Stanin, water travels at .87 linear feet per year, and
19 I think that was a typo because I think she said per day. And
10:36AM 20 then he draws off 10,000 feet across the site and says, oh, it
21 would take 80 years. Again, he said this is what the evidence
22 would show.

23 Did Dr. Hokkanen or Mr. Daus or anyone else on
24 their side calculate groundwater velocity? I've done that in
10:37AM 25 other cases, but I didn't do that here. Well, would you agree

1 that it travels at different rates for different aquifers? Oh,
2 yeah. Everybody knows that.

3 So this is in evidence. You have table 8 -- I'm
4 forgetting the trial exhibit number, but we can find it. She
10:37AM 5 identified that for onsite -- right? Because there's onsite
6 travel time and offsite. So she went through this analysis --
7 this is right out of her expert report -- and presented in this
8 courtroom onsite average linear groundwater velocity. It's not
9 .87 feet per year. It's 6.6 feet per day. Per day. And she
10:37AM 10 said, this is not a precise number. Could it be lower? Could
11 it be higher? Is it impacted when it rains and there's a
12 recharge event and the groundwater flows a little faster?

13 But to say -- to stand here and say it was .87
14 feet per year -- we will assume that was a mistake or a typo --
10:38AM 15 but it's not. This is the average of all of those aquifers.

16 I think Mr. Lechler was just asked yesterday, you
17 wouldn't average those; right? Because that would suggest that
18 the slower aquifers are moving faster and the faster ones are
19 moving slower. We asked him that question, Mr. Lechler. He
10:38AM 20 knew the answer when he talked to you in opening statement.
21 The .87 is what's called the bulk rate. It's offsite and
22 onsite for all the aquifers.

23 She testified, Ms. Stanin, quote, "The movement
24 of groundwater would be consistent with about 3,000 feet per
10:38AM 25 year. It's just simple math after that. If you want to go

1 from the burn area and it's 10,000 feet, then three-and-a-half
2 years, something like that." Is it three and a half? Is it
3 five years? Is it ten years? It's not 80 years.

4 And, of course, there were a number of things
10:39AM 5 like groundwater velocity that Whittaker's witnesses,
6 well-polished I thought, experienced, testified a lot in court,
7 they knew to stay away from groundwater velocity, didn't they?

8 Their reliance on the monitoring wells, there are
9 too few. They're in the wrong area. They were installed late.
10:39AM 10 They don't tell us what was happening. You need to look at the
11 groundwater flow direction and where the chemicals start and
12 where they end up.

13 And so this was -- we're looking now at a page
14 from Exhibit 34. This is the CW-1 well. Why are we talking
10:39AM 15 about the CW-1 well? Because it's in that northern area where
16 Ms. Stanin and Mr. Lechler explained, no, that's an
17 undifferentiated, undelineated area. There are not offsite
18 monitoring wells. And yet their expert, oh, well, we have this
19 one here. And if this plume was there, it would spread out
10:40AM 20 everywhere, and it would show up in this one monitoring well.
21 Well, here's that monitoring well, CW-1. It's too shallow.
22 Doesn't get down into the contaminated aquifer. That's from
23 the 2015 report by Mr. Lechler.

24 We heard over and over, and we saw just a flurry
10:40AM 25 of these maps, and you may see them again. They were coming up

1 fast and furious with their witnesses earlier this week. So we
2 went back and looked at them. Again, these are maps prepared
3 every quarter, or they were, by AECOM.

4 They clearly show offsite migration. Here you
10:41AM 5 can see this is what -- they will draw a TCE plume just out
6 to -- you know, if there's a hit in one monitoring well. But
7 you can see hundreds and hundreds of feet. I mean, this area,
8 just for perspective, is over a thousand feet. And this won't
9 show up in the record, but we can all see it. AECOM drew these
10:41AM 10 areas. There's no monitoring wells there.

11 So their only excuse is you must assume complete
12 dispersion of these chemicals. Well, then why do you have
13 200 groundwater monitoring wells at your site? Maybe you only
14 need five since the groundwater with the contamination -- it's
10:41AM 15 just not true. It's not true.

16 So failed to investigate, travel time. That's
17 not true. I won't talk too much about this, but we heard
18 references in opening statement, the evidence will show
19 Whittaker didn't even occupy this site until 1967 as though
10:42AM 20 they had no responsibility for what went on before that.

21 And yet, as you were just instructed, Whittaker
22 is the successor to Bermite Powder Company. Bermite occupied
23 the site from 1943 to 1967. Whittaker is, therefore, liable
24 for any act or omission by Bermite that resulted in negligence,
10:42AM 25 nuisance, or trespass.

1 And why is this important? Because Mr. Blum will
2 stand up and say, well, he may have those memos from 1979 and
3 1980 and 1982, but he doesn't have anything from Bermite saying
4 we are also dumping. This is what we call a reasonable
10:42AM 5 inference. First of all, it doesn't matter, does it, if the
6 TCE and PCE got into the ground through this dumping in 1980 or
7 1960. It goes back to 1943.

8 You will also see the instruction that says where
9 the party has the ability to produce better evidence but
10:43AM 10 produced weaker evidence. They produced zero evidence from
11 Bermite's operations. How did they dispose of the sludge from
12 those degreasing operations? The evidence is -- the proof is
13 in the pudding; right? There is a massive amount in the ground
14 and not just one area; right?

10:43AM 15 This one I don't think we need to spend a lot of
16 time on. Whittaker has now in 2017 and 2018 put in a handful
17 of these extraction wells that all together pump about
18 300 gallons per minute as though that's going to contain all
19 the contamination on the site. Of course, if you start doing
10:43AM 20 that in 2017, what happened between 1982 and 2017? So that
21 doesn't provide them a -- allow them to avoid their
22 responsibility in this case.

23 The pumping capacity of the Saugus 1 and 2 wells
24 dwarfs all of the wells in their extraction system. All of
10:44AM 25 their wells are about 300 gallons per minute. The Saugus wells

1 pump at 2,200 gallons per minute. Of course the contamination
2 migrated offsite.

3 One of the other things that occurred to me --
4 and I'm winding up here, and I appreciate your patience. We
10:44AM 5 heard a phrase yesterday from Mr. Lechler when he was asked,
6 didn't you say potential? Didn't you say potential? Where do
7 you say that it is Whittaker? Throughout this case -- and this
8 is just something lawyers do, and you will have to sift through
9 it with the evidence. You know, what do we know to be true in
10:44AM 10 this case?

11 Well, finally, I mean, Mr. Lechler explained, I
12 did a scoping part of my investigation. That's when I said
13 there were potential sources. Well, you didn't look at this
14 source. Yes, I did. It's in my report. I ruled it out. That
10:45AM 15 was the scoping phase. That's when -- so lawyers sometimes
16 seize on a word in a document or a word that a witness said in
17 a deposition and becomes this game of semantics.

18 And that was the word that Mr. Lechler used
19 yesterday, and then he explained, I stand by what was in my
10:45AM 20 report. There was a scoping phase. I investigated. Well,
21 where did you say that Whittaker is a source? Well, it's right
22 here, page 34. "Multiple lines of evidence --" I'm reading
23 from Exhibit 34. Mr. Lechler wrote this in 2015. "Multiple
24 lines of evidence suggest that the former Whittaker-Bermite
10:45AM 25 facility is --" he was asked, where do you say that it is a

1 source? Well, I used the word "is" "-- is a source of TCE."

2 And he goes on to explain in detail what those
3 numerous sources are. This includes the similarities of the
4 distribution of TCE and perchlorate, et cetera. It follows

10:46AM

5 that Whittaker-Bermite is a likely source of PCE. So TCE,
6 Whittaker is a source. PCE, they're a likely source. But
7 didn't you say potential at page -- so this is what we know to
8 be true, I would submit.

9 And he prepared a number of charts; right?

10:46AM

10 Because we said, well, you look at where is the contamination
11 at your site? What's in our wells? And in the Saugus wells,
12 94 percent of the time they're detecting PCE at Saugus 1,
13 28 percent at Saugus 2. 100 percent of the time they're
14 detecting TCE. 99 percent of the time they're detecting TCE in
15 Saugus 2. Obviously both of those chemicals are in huge
16 amounts at the Whittaker-Bermite site. And it was on that
17 basis that he prepared these charts.

10:46AM

18 He also talked about -- and we looked at this.
19 Again, he went through a detailed investigation. Did scoping,
20 did investigation, came to conclusions. Yes, I thought there
21 should be more offsite monitoring wells to give us better
22 information. But you can't rely on this one. And he went
23 through this whole well. It's too shallow. Well, this was
24 just your -- no. This is data. We can measure.

10:47AM

10:47AM

25 So one of the instructions you will receive in

1 hard copy and that the judge read to you was about a
2 substantial factor. And the evidence tells us there's no
3 question that the Whittaker site with the dumping, the bearing,
4 the delayed remediation for two decades, that they are a
10:47AM 5 substantial factor in causing harm. That's a factor that a
6 reasonable person would consider to have contributed to the
7 harm. It must be more than a remote or trivial factor. It
8 does not have to be the only cause of harm.

9 So all this discussion about what about SIC?

10:48AM 10 Well, it's their burden to prove that SIC is a substantial
11 factor. Their own expert said, I can't say that. I can't say
12 that. I see where they are. They're close. His own attorney
13 asked him, well, there's a couple chemicals that we find at
14 SIC -- right? -- that 1,2-DCA and vinyl chloride used PVC, used
10:48AM 15 in huge amounts, detected in large amounts, not found in the
16 Saugus wells.

17 And he was asked, well -- his own witness --
18 right? -- Dr. Hokkanen, doesn't that mean that the TCE is not
19 from SIC? Dr. Hokkanen, not necessarily. Okay. Well, he's
10:48AM 20 the fellow, when I asked him, can you say more likely than not
21 that the TCE is from SIC? No. I'm not saying that. I'm
22 saying it's possible. Okay. Well, then they haven't met their
23 burden.

24 SIC is not a substantial factor. But the
10:49AM 25 evidence tells us certainly that Whittaker, a thousand-acre

1 site with decades and hundreds of thousands of pounds of this
2 contamination, is more than a trivial source here.

3 Last thing I want to talk about is that the
4 proper way for Whittaker to take responsibility is with proper
10:49AM 5 water treatment. This is one of the instructions -- I won't
6 read the whole thing to you. But the important thing is did we
7 present evidence of damages; right? The water agency was
8 clearly impacted. They shut down their wells. They had to buy
9 replacement water, and now they want treatment.

10:49AM 10 Keith Abercrombie, one of the first witnesses in
11 the case, in operations testified repeatedly, we need the
12 treatment. So that's what the evidence tells us. And he went
13 through his calculations of replacement water which are really
14 undisputed.

10:50AM 15 And this instruction -- of course the SCV Water
16 does not have to prove the exact amount of damages that will
17 provide reasonable calculation for the harm. You must not
18 speculate or guess.

19 So you have these exhibits. This is 491. There
10:50AM 20 were a series of calculations for -- well, we had to blend the
21 water at this well because of the contamination. Then we had
22 to buy replacement water. And he went through those, and he
23 explained his whole process. And that was Keith Abercrombie.

24 And if you go through all those exhibits, 491-A,
10:50AM 25 492, that covers his blend water and replacement water. He's

1 the operations guy. He understood those sources of water.

2 And the only response to this was, well, couldn't
3 you use banked water instead of this water? Then the next
4 witness came in -- I think it was Mr. Masnada -- and said,
10:51AM 5 well, that generally costs twice as much. So that didn't go
6 anywhere. This was a reasonable approach. It's actual harm.
7 And he identified the cost to the agency.

8 And then we heard from Dr. Najm who works with
9 treatment systems for a living. He teaches. He's very
10:51AM 10 familiar with this. He works with clients who need to know
11 what these treatment systems are going to cost. And this is in
12 evidence. This is Exhibit 523.

13 And he went through the standard cost estimate,
14 and he identified that for capital costs, for all of these
10:51AM 15 treatment systems at Saugus, V-201, V-205, the capital costs
16 would be \$30 million, 30.4. And when I asked him, do you still
17 think those are the costs? He hesitated because he knows
18 what's going on right now. He knows that -- and he said in his
19 report -- the costs could be as high as 45.6 million. And he's
10:52AM 20 concerned with projects right now because they're more
21 expensive, and that's why you build in contingencies. Yes,
22 vessels six months ago cost about \$200,000 each. I think he
23 said it would take many, many months to even get those now. So
24 markets change.

10:52AM 25 This was a reasonable accurate estimate by an

1 expert in the field. He does this for a living. He relied on
2 the standard principles that bona fide cost estimators use.
3 And then he identified over the next 30 years we have O&M costs
4 \$34 million, undisputed. No one came in, even Mr. Simpson, the
10:52AM 5 longtime Whittaker consultant working with Mr. Lardiere the
6 last 16, 17 years, had no opinion on O&M costs to share.

7 So you take the cost of the treatment -- and you
8 have this exhibit. It's part of 524. He explained each of the
9 detailed areas. You start with equipment -- and he's very
10:53AM 10 familiar with these equipment costs. And you didn't hear
11 Mr. Simpson or anyone else from Whittaker say that cartridge
12 filters, vessels, the backwash tank, valves, and miscellaneous,
13 the slabs, these are all essential requirements.

14 What you did hear Mr. Simpson say is -- I think
10:53AM 15 you heard Mr. Blum in opening say, it's like a watch. Just go
16 in and buy a ready-made watch. And Mr. Simpson said, it's like
17 a car. You can either go to the dealer and buy a car or you
18 can hire someone to design. It's not like a car. It's a
19 construction project. It's a construction project. Each site
10:53AM 20 is different.

21 So you will have to decide what makes the most
22 sense when you deliberate on this. But Dr. Najm went through
23 exactly how he came up with these -- this estimate.

24 So the damages from Keith Abercrombie, he
10:54AM 25 identified 11-and-a-half-million dollars. Dr. Najm identified

1 the \$64.6 million to build all these treatment systems and to
2 operate them for 30 years. Yes, that's a lot of money, but
3 that's the price for taking responsibility.

4 So when you deliberate, you will have that
10:54AM 5 evidence. And I think the evidence tells us that \$76.1 million
6 is the appropriate measure of damages in this case to deal with
7 the contamination that Whittaker did not deal with.

8 And so the verdict form is pretty
9 self-explanatory. Negligence, fault of plaintiff, was
10:54AM 10 Whittaker Corporation negligent? I think the evidence tells us
11 they were. Was it a substantial factor? I think the evidence
12 tells us yes. Did the water agency own, lease, occupy, or
13 control the property? Mike Alvord testified to this.

14 Keith Abercrombie talked about all the equipment they used in
10:55AM 15 these operations. Yes, of course, they own it or control it.

16 This is under the trespass claim. You won't be
17 asked questions on that. Public nuisance.

18 So in each of these, you know, you will weigh it.
19 You will look at the evidence. It's not up to the lawyers to
10:55AM 20 tell you how to decide this. As I said at the beginning and
21 will say again, just follow the evidence, and I think the
22 evidence tells us the just outcome here.

23 Punitive damages, this is a -- you have
24 instructions on this, and I think, if ever there was a case
10:55AM 25 where punitive damages are appropriate for the delay, denial,

1 and deception, this is that case. And so the evidence tells us
2 that there was malice or oppression or fraud. Was it committed
3 by one or more officers, directors, or managing agents? Well,
4 you saw the evidence. Joe Alibrandi, John Peloquin, and
10:56AM 5 Gordon Louttit sat in that meeting in June 1987 and, you know,
6 decided not to deal with it. Don't deal with the
7 contamination. We can always give the property to
8 Tammy Faye Bakker or the EPA. You saw the evidence from -- you
9 know, that Alan Sorsher was shown around the property by

10:56AM 10 John Peloquin.

11 So this wasn't some, you know, salesman out in
12 Ohio. This was the president of Whittaker. There is no
13 question that this was the managing directors or agents of
14 Whittaker that were involved in this. For what? To save some
10:56AM 15 money.

16 Burden of proof, and I think we all understand
17 this. The judge explained that in this case there's two levels
18 of burden of proof. To prove liability, to prove the damages,
19 to prove the negligence, the standard is more likely than not
10:56AM 20 probably true. More probably true. For punitive damages it's
21 clear and convincing. The evidence here is really undisputed.
22 So, of course, it's clear and convincing.

23 I won't go through all the directions on this on
24 punitive damages.

10:57AM 25 But to talk about the preponderance of the

1 evidence, what does that mean? That means, if you thought that
2 the evidence was equally balanced -- right? -- that Whittaker
3 actually came in and explained these things and that Whittaker
4 had delivered on the promises they made in opening statement,
10:57AM 5 then we would lose. You would say it's evenly balanced. I
6 don't think Mr. Richard proved his case. But if we have just a
7 feather more evidence than -- that tilts the scale in our
8 favor.

9 But in this case the witnesses, the documents,
10:57AM 10 the memos, we brought this evidence into court. We showed you.
11 This gives us a glimpse into how these decisions were made at
12 Whittaker. The evidence is overwhelming, and it certainly
13 meets more likely than not.

14 And there's at the bottom of the heap is
10:58AM 15 BJ Lechler. I should have put him at the top.

16 And so I come back to the point I made in opening
17 statement which is that every citizen of California has the
18 right to pure and safe drinking water. And on behalf of my
19 client, I would ask that you hold Whittaker responsible.

10:58AM 20 Sometimes responsibility has to be imposed. Someone has to
21 lose a case or be told you did the wrong thing here and now, as
22 Joe Alibrandi said in 1987, we might have some liability for
23 this at some point. This is that point.

24 So we would ask on behalf of my client that, when
10:58AM 25 you deliberate, look at the evidence. Does it tell us that

1 Whittaker should now be held responsible? And I think it does.

2 So thank you.

3 THE COURT: Ladies and gentlemen, we will take
4 our morning break. It is now just about 11:00 o'clock. We
10:59AM 5 will take a 15-minute break.

6 Please remember, don't speak to anyone about the
7 case, the people, or the subject matter involved. Continue to
8 keep an open mind until you have heard all of the closing
9 arguments and the views of your fellow jurors. Thank you.

10:59AM 10 (The following proceedings were held in
11 open court outside the presence of the jury:)

12 THE COURT: We are in recess until 11:15.

13 MR. BLUM: Do you have a special verdict form
14 yet?

10:59AM 15 THE COURT: Not yet.

16 (A recess was taken at 10:59 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, MIRANDA ALGORRI, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 3RD DAY OF DECEMBER, 2021.

/S/ MIRANDA ALGORRI

MIRANDA ALGORRI, CSR NO. 12743, CRR
FEDERAL OFFICIAL COURT REPORTER

\$	2025:5, 2025:7 1940S [2] - 2087:1, 2087:3 1943 [4] - 2049:6, 2083:25, 2113:23, 2114:7 1949 [2] - 2087:14, 2087:23 1953 [1] - 2087:18 1960 [1] - 2114:7 1960S [1] - 2086:19 1967 [4] - 2049:6, 2083:24, 2113:19, 2113:23 1976 [2] - 2090:17, 2090:18 1979 [6] - 2085:14, 2085:21, 2086:5, 2091:2, 2092:4, 2114:2 1980 [5] - 2083:21, 2093:10, 2114:3, 2114:6 1982 [16] - 2083:10, 2084:6, 2084:25, 2092:6, 2095:18, 2095:23, 2096:8, 2097:3, 2098:9, 2098:15, 2102:3, 2103:5, 2105:9, 2114:3, 2114:20 1985 [6] - 2093:10, 2096:19, 2096:22, 2098:22, 2099:2, 2100:11 1986 [6] - 2098:7, 2098:11, 2100:1, 2100:11, 2100:21, 2102:18 1987 [7] - 2074:19, 2075:13, 2076:9, 2076:24, 2091:23, 2122:5, 2123:22 1988 [3] - 2075:14, 2075:20, 2075:22 1990 [3] - 2101:13, 2102:13, 2102:18 1991 [2] - 2075:23, 2076:9 1999 [1] - 2103:4 1ST [1] - 2019:24	20 [6] - 2078:18, 2095:5, 2103:2, 2103:3, 2103:8, 2105:21 200 [5] - 2093:4, 2093:9, 2103:8, 2113:13 2002 [5] - 2085:25, 2086:1, 2086:6, 2098:9, 2102:24 2007 [2] - 2079:15, 2080:2 2010 [1] - 2079:14 2011 [1] - 2093:13 2012 [2] - 2108:8, 2109:4 2014 [1] - 2079:17 2015 [2] - 2112:23, 2115:23 2017 [3] - 2114:16, 2114:20 2018 [1] - 2114:16 2019 [2] - 2019:8, 2104:9 2021 [3] - 2019:14, 2023:1, 2125:15 205 [3] - 2089:1, 2097:23, 2099:10 24 [1] - 2043:2 25 [2] - 2083:16, 2084:6 26 [4] - 2026:1, 2026:15, 2028:1, 2028:11 27 [1] - 2043:4 28 [2] - 2116:13, 2125:8 29 [2] - 2089:2, 2089:7	2115:23 342 [2] - 2084:24, 2098:23 343 [2] - 2035:20, 2035:21 34TH [2] - 2020:7, 2020:10 350 [1] - 2019:24 37 [1] - 2031:23 382 [1] - 2101:13 3903(F) [1] - 2036:2 3RD [1] - 2125:15	9 90012 [1] - 2019:25 90017 [1] - 2020:7 94 [1] - 2116:12 94111 [2] - 2020:11, 2020:16 99 [1] - 2116:14 9TH [2] - 2029:10, 2029:23
'	'40S [1] - 2086:14 '50S [1] - 2086:14 '80S [4] - 2078:7, 2082:17, 2099:4, 2102:13			A
/			4	A.M [2] - 2044:22, 2124:16 A.M [2] - 2019:14, 2023:1 ABANDONED [1] - 2109:3 ABBREVIATED [1] - 2058:13 ABERCROMBIE [4] - 2118:10, 2118:23, 2120:24, 2121:14 ABILITY [4] - 2045:7, 2046:15, 2047:17, 2114:9 ABLE [3] - 2029:16, 2035:6, 2040:14 ABNORMALLY [1] - 2052:23 ABOVE [1] - 2125:11 ABOVE-ENTITLED [1] - 2125:11 ABSENCE [1] - 2030:25 ABSORPTION [1] - 2027:17 ACADEMIC [1] - 2026:13 ACCEPT [2] - 2048:1, 2080:7 ACCORDANCE [1] - 2062:12 ACCORDING [2] - 2070:6, 2084:11 ACCOUNTS [1] - 2067:21 ACCURACY [1] - 2068:18 ACCURATE [1] - 2119:25 ACCURATELY [1] - 2070:24 ACHIEVEMENT [1] - 2054:16 ACRE [1] - 2117:25 ACT [1] - 2038:7 ACT [11] - 2038:9, 2048:22, 2049:7,
/S [1] - 2125:18			4 [1] - 2042:17 42 [1] - 2105:16 437 [1] - 2096:19 445 [1] - 2075:24 4455 [1] - 2019:24 45.6 [1] - 2119:19 486 [1] - 2102:22 491 [1] - 2118:19 491-A [1] - 2118:24 492 [1] - 2118:25	
1	1 [4] - 2050:10, 2059:2, 2114:23, 2116:12 1,2-DCA [1] - 2117:14 1,200-FOOT [1] - 2093:11 1.8 [1] - 2077:16 10 [1] - 2019:13 10,000 [2] - 2110:20, 2112:1 100 [3] - 2059:13, 2059:22, 2116:13 100,000 [1] - 2088:10 10:59 [1] - 2124:16 11-AND-A-HALF-MILLION [1] - 2120:25 11:00 [1] - 2124:4 11:15 [1] - 2124:12 12743 [2] - 2019:23, 2125:19 1381 [2] - 2098:11, 2099:4 14 [2] - 2035:20, 2035:21 15 [1] - 2024:24 15-MINUTE [1] - 2124:5 16 [1] - 2120:6 17 [1] - 2120:6 17TH [1] - 2076:24 18 [1] - 2042:22 18-06825-SB [1] - 2019:7 18-6825 [1] - 2023:5 1899 [2] - 2086:11, 2086:20 18TH [1] - 2087:17 19 [3] - 2019:8,	3 3,000 [1] - 2111:24 30 [2] - 2120:3, 2121:2 30(B)(6 [4] - 2048:5, 2048:8, 2048:11, 2048:14 30.4 [1] - 2119:16 300 [2] - 2114:18, 2114:25 317 [10] - 2084:23, 2089:3, 2096:11, 2098:14, 2098:23, 2101:14, 2101:18, 2101:20, 2102:6, 2102:7 32,000 [1] - 2083:14 32,000-GALLON [1] - 2084:14 34 [4] - 2105:18, 2112:14, 2115:22,	5 5 [1] - 2099:15 50 [1] - 2020:10 500 [1] - 2020:15 523 [1] - 2119:12 524 [1] - 2120:8 5TH [2] - 2035:20, 2035:21	
	2 [5] - 2019:14, 2023:1, 2114:23, 2116:13, 2116:15 2,200 [1] - 2115:1 2-INCH [2] - 2093:3, 2093:12	3	6 6.6 [1] - 2111:9 60 [1] - 2028:17 64.6 [1] - 2121:1	
			7 700 [1] - 2020:16 753 [1] - 2125:8 76.1 [1] - 2121:5 777 [1] - 2020:6	
			8 8 [2] - 2079:8, 2111:3 80 [2] - 2110:21, 2112:3 87 [4] - 2110:18, 2111:9, 2111:13, 2111:21 8:02 [2] - 2019:14, 2023:1 8:36 [1] - 2044:22	

2049:11, 2050:16, 2052:11, 2052:20, 2055:23, 2082:11, 2082:16, 2113:24 ACTED [4] - 2050:22, 2057:12, 2063:24, 2064:11 ACTING [6] - 2049:17, 2050:16, 2052:11, 2052:19, 2055:23, 2082:11 ACTION [5] - 2032:12, 2033:24, 2033:25, 2036:6, 2096:24 ACTIVE [1] - 2098:2 ACTIVITIES [1] - 2054:21 ACTIVITY [3] - 2052:24, 2054:6, 2054:7 ACTS [2] - 2048:25, 2064:15 ACTUAL [6] - 2027:12, 2030:4, 2058:8, 2061:21, 2078:21, 2119:6 ACUTE [1] - 2085:18 ADD [1] - 2024:9 ADDED [1] - 2104:13 ADDITION [3] - 2028:24, 2055:2, 2088:2 ADDITIONAL [3] - 2061:20, 2070:11, 2073:4 ADDRESS [11] - 2026:8, 2026:16, 2027:24, 2028:6, 2029:1, 2029:17, 2031:8, 2036:8, 2036:13, 2044:2, 2044:11 ADDRESSED [3] - 2026:22, 2029:13, 2044:14 ADDRESSING [1] - 2026:22 ADEQUATE [3] - 2051:15, 2106:6, 2106:10 ADEQUATELY [1] - 2099:14 ADJACENT [1] - 2086:22 ADJUSTMENTS [1] - 2062:16 ADMISSION [2] - 2048:9, 2075:8 ADMITTED [4] - 2062:22, 2079:8,	2104:17, 2105:4 ADOPTED [2] - 2064:7, 2090:21 ADVANCES [1] - 2054:17 ADVISE [1] - 2070:7 AECOM [2] - 2113:3, 2113:9 AFFECTED [1] - 2056:5 AGENCIES [2] - 2078:23, 2096:9 AGENCY [5] - 2023:6, 2044:24, 2049:24, 2050:24, 2057:11 AGENCY [1] - 2019:5 AGENCY [18] - 2027:13, 2031:4, 2033:3, 2049:13, 2078:22, 2079:9, 2081:6, 2081:7, 2095:21, 2101:10, 2106:9, 2107:3, 2108:3, 2108:14, 2109:3, 2118:7, 2119:7, 2121:12 AGENCY'S [1] - 2110:17 AGENT [2] - 2049:15, 2065:3 AGENTS [7] - 2048:22, 2048:25, 2063:24, 2064:3, 2064:6, 2122:3, 2122:13 AGO [4] - 2074:15, 2080:14, 2081:18, 2119:22 AGREE [7] - 2026:12, 2036:10, 2041:24, 2047:3, 2079:24, 2080:5, 2110:25 AGREED [3] - 2042:2, 2043:13, 2073:18 AGREED-UPON [1] - 2042:2 AGREEING [1] - 2102:23 AGREEMENT [13] - 2043:16, 2044:13, 2066:8, 2070:5, 2078:21, 2079:7, 2079:15, 2080:2, 2080:4, 2080:8, 2080:13, 2080:15, 2081:1 AHEAD [2] - 2045:23, 2085:24 AHOLD [1] - 2079:19 AL [3] - 2019:8,	2023:7, 2026:5 ALAN [3] - 2078:16, 2101:21, 2122:9 ALGORRI [4] - 2019:23, 2125:5, 2125:18, 2125:19 ALIBRANDI [4] - 2076:20, 2091:23, 2122:4, 2123:22 ALLEGATION [2] - 2030:10, 2030:25 ALLEGE [1] - 2030:14 ALLOW [3] - 2029:6, 2088:18, 2114:21 ALLOWED [4] - 2044:4, 2045:12, 2047:23, 2070:24 ALLOWING [1] - 2061:15 ALMOST [7] - 2084:9, 2085:1, 2089:14, 2093:15, 2095:12, 2095:25, 2098:19 ALSO [1] - 2020:18 ALVORD [4] - 2109:13, 2109:25, 2110:12, 2121:13 ALVORD'S [2] - 2027:7, 2031:3 AMEND [1] - 2039:22 AMENDED [2] - 2037:25, 2038:3 AMMUNITION [1] - 2085:8 AMOUNT [11] - 2027:18, 2059:24, 2060:10, 2060:14, 2062:11, 2063:3, 2089:19, 2089:25, 2090:22, 2114:13, 2118:16 AMOUNTS [4] - 2088:5, 2116:16, 2117:15 ANALYSIS [4] - 2035:7, 2099:7, 2107:23, 2111:6 AND [3] - 2125:6, 2125:9, 2125:11 ANGELES [1] - 2020:7 ANGELES [3] - 2019:15, 2019:25, 2023:2 ANNOUNCE [1] - 2066:6 ANNOYANCE [1] - 2053:23 ANNOYED [2] - 2053:3, 2056:8 ANOMALIES [1] -	2108:15 ANSWER [5] - 2059:2, 2059:3, 2069:20, 2072:16, 2111:20 ANSWERED [1] - 2042:23 ANSWERING [2] - 2036:11, 2069:19 ANTICIPATED [1] - 2060:13 APP [2] - 2035:20, 2035:21 APPEAR [1] - 2025:2 APPEARANCES [1] - 2020:1 APPEARANCES [1] - 2023:8 APPELLATE [1] - 2032:23 APPLICABLE [2] - 2038:21, 2038:24 APPLICATION [3] - 2067:10, 2082:12, 2099:1 APPLIED [1] - 2062:21 APPLIES [4] - 2036:4, 2038:18, 2046:24, 2067:13 APPLY [7] - 2031:16, 2035:8, 2039:7, 2046:19, 2047:1, 2049:22, 2082:24 APPORTIONMENT [2] - 2039:17, 2058:10 APPRECIATE [1] - 2115:4 APPROACH [1] - 2119:6 APPROACHED [1] - 2067:16 APPROPRIATE [6] - 2037:8, 2038:15, 2039:13, 2040:1, 2121:6, 2121:25 APPROPRIATIVE [7] - 2028:14, 2028:18, 2029:5, 2061:15, 2061:19, 2061:23, 2062:1 APPROVED [1] - 2064:7 AQUIFER [10] - 2084:21, 2085:4, 2093:24, 2096:12, 2098:19, 2098:20, 2105:13, 2106:3, 2106:4, 2112:22 AQUIFERS [9] - 2094:9, 2103:18, 2103:20, 2105:12,	2106:20, 2111:1, 2111:15, 2111:18, 2111:22 ARBITRATION [5] - 2074:6, 2079:9, 2079:12, 2081:8, 2081:21 AREA [13] - 2091:11, 2093:11, 2102:5, 2102:8, 2102:19, 2106:5, 2106:7, 2112:1, 2112:9, 2112:15, 2112:17, 2113:7, 2114:14 AREAS [11] - 2089:8, 2090:4, 2090:7, 2091:5, 2092:3, 2099:10, 2105:7, 2105:12, 2105:25, 2113:10, 2120:9 ARGUABLY [1] - 2028:2 ARGUE [7] - 2045:7, 2045:9, 2045:14, 2046:18, 2070:25, 2071:7, 2090:14 ARGUMENT [7] - 2033:13, 2045:18, 2070:18, 2070:19, 2070:21, 2070:22, 2071:14 ARGUMENTS [8] - 2045:11, 2046:18, 2046:22, 2062:18, 2062:19, 2070:11, 2070:13, 2124:9 ARMS [1] - 2090:21 ARMY [1] - 2105:19 AROSE [1] - 2079:7 ARTIFICIAL [3] - 2054:25, 2055:6, 2104:21 ASIDE [1] - 2031:6 ASPECT [1] - 2045:5 ASSEMBLE [1] - 2065:20 ASSERT [3] - 2049:24, 2049:25, 2050:1 ASSERTED [4] - 2030:23, 2049:21, 2049:23, 2050:4 ASSERTION [1] - 2081:11 ASSESSMENT [2] - 2096:10, 2102:7 ASSIGNED [1] - 2059:25 ASSIGNING [2] - 2058:22, 2059:20 ASSUME [2] -
--	--	---	--	--

2111:14, 2113:11 ASSUMING [1] - 2044:17 ASSUMPTION [1] - 2107:18 ATTACHED [1] - 2104:7 ATTEMPT [2] - 2066:15, 2069:14 ATTENTION [2] - 2046:14, 2071:22 ATTITUDE [1] - 2094:21 ATTORNEY [5] - 2072:24, 2073:11, 2073:17, 2078:18, 2117:12 ATTORNEYS [2] - 2062:19, 2074:12 AUGUST [1] - 2099:2 AUTHOR [2] - 2086:22, 2105:17 AUTHORITY [11] - 2028:23, 2029:22, 2033:18, 2035:7, 2036:3, 2038:5, 2049:1, 2049:13, 2049:14, 2065:4, 2086:18 AUTHORIZE [1] - 2049:11 AUTHORIZED [2] - 2048:6, 2064:2 AUTO [1] - 2089:4 AVERAGE [3] - 2111:8, 2111:15, 2111:17 AVOID [5] - 2054:9, 2064:17, 2092:10, 2098:11, 2114:21 AVOIDED [2] - 2092:14, 2096:18 AVOIDING [1] - 2054:23 AWAIT [1] - 2069:20 AWARD [4] - 2060:11, 2062:11, 2062:20, 2063:2 AWARDING [1] - 2060:16 AWARE [1] - 2064:16 AWARENESS [1] - 2088:3	2070:7 BAKKER [3] - 2078:4, 2078:5, 2122:8 BALANCED [2] - 2123:2, 2123:5 BANKED [1] - 2119:3 BARRED [2] - 2036:20, 2036:22 BARREL [1] - 2089:13 BASE [4] - 2032:16, 2050:8, 2064:23, 2066:23 BASED [8] - 2028:21, 2034:20, 2054:6, 2062:1, 2062:20, 2069:1, 2075:19, 2096:6 BASIC [4] - 2032:17, 2033:21, 2047:13, 2050:11 BASIN [3] - 2031:25, 2094:2, 2105:20 BASIS [2] - 2026:3, 2116:17 BEAN [7] - 2083:10, 2084:6, 2095:9, 2096:8, 2096:25, 2098:14, 2101:17 BEAN'S [2] - 2098:20, 2103:2 BEAR [1] - 2070:15 BEARING [1] - 2117:3 BEATON [1] - 2020:20 BECAME [2] - 2035:5, 2090:3 BECOME [3] - 2069:10, 2090:1, 2092:19 BECOMES [1] - 2115:17 BECOMING [1] - 2089:18 BEGIN [3] - 2060:3, 2065:21, 2070:13 BEGINNING [4] - 2038:7, 2047:14, 2064:10, 2121:20 BEHALF [5] - 2049:11, 2063:24, 2102:23, 2123:18, 2123:24 BEHIND [1] - 2076:18 BELIEF [2] - 2065:11, 2066:21 BELONGS [2] - 2057:23, 2061:24 BELOW [1] - 2057:8 BENCH [1] - 2044:10 BENEATH [1] - 2031:2 BENEFIT [10] - 2030:11, 2033:9,	2037:15, 2039:8, 2053:10, 2053:12, 2054:10, 2062:14, 2096:14 BENEFITS [1] - 2033:10 BERMITE [13] - 2049:5, 2049:7, 2096:15, 2096:17, 2101:25, 2113:22, 2113:24, 2114:3, 2115:24, 2116:5, 2116:16 BERMITE'S [1] - 2114:11 BEST [1] - 2038:1 BETTER [4] - 2090:24, 2090:25, 2114:9, 2116:21 BETWEEN [5] - 2029:4, 2034:5, 2060:22, 2078:22, 2114:20 BEYOND [2] - 2065:16, 2083:15 BIG [8] - 2075:15, 2078:14, 2079:11, 2085:7, 2089:12, 2089:15, 2107:3, 2109:8 BIRD'S [1] - 2049:20 BIRD'S-EYE [1] - 2049:20 BIT [6] - 2070:3, 2071:19, 2072:7, 2073:5, 2076:15, 2086:18 BJ [2] - 2105:17, 2123:15 BLAME [1] - 2095:21 BLEND [2] - 2118:20, 2118:25 BLOG [1] - 2067:10 BLUM [14] - 2023:14, 2024:11, 2026:10, 2026:21, 2031:20, 2035:23, 2039:17, 2041:4, 2044:16, 2087:8, 2092:19, 2100:12, 2114:1, 2120:15 BLUM [38] - 2020:13, 2020:14, 2023:14, 2024:13, 2024:19, 2024:22, 2025:10, 2025:15, 2025:18, 2025:22, 2026:2, 2026:18, 2032:5, 2033:7, 2033:16, 2033:20, 2034:12,	2034:23, 2035:3, 2035:10, 2035:24, 2036:10, 2036:17, 2039:19, 2039:22, 2041:5, 2041:11, 2041:13, 2041:17, 2041:24, 2043:13, 2043:16, 2044:3, 2044:8, 2044:17, 2045:3, 2081:10, 2124:13 BLUM'S [1] - 2108:23 BLUMENFELD [1] - 2019:3 BOARD [2] - 2097:7, 2097:24 BOARD [1] - 2045:14 BOB [9] - 2083:10, 2084:6, 2095:9, 2096:8, 2096:25, 2098:14, 2098:20, 2101:17, 2103:2 BOLTS [1] - 2109:8 BONA [1] - 2120:2 BOND [1] - 2073:1 BORDER [1] - 2093:10 BOTTOM [1] - 2123:14 BOUNDARY [3] - 2104:21, 2104:22 BOWL [4] - 2090:6, 2092:2, 2101:21, 2102:19 BOX [1] - 2038:17 BOYS [1] - 2089:15 BQ [1] - 2101:6 BRASS [1] - 2110:4 BREAK [4] - 2040:14, 2085:3, 2124:4, 2124:5 BREAKS [3] - 2084:13, 2084:18 BRIEF [1] - 2097:25 BRIEFED [2] - 2028:20, 2037:7 BRIEFING [4] - 2029:19, 2035:16, 2037:15, 2038:22 BRIEFLY [1] - 2044:12 BRING [5] - 2040:13, 2040:18, 2045:23, 2046:2, 2076:2 BRINGS [1] - 2083:13 BRITNEY [1] - 2078:7 BROADLY [1] - 2029:14 BROUGHT [4] - 2072:6, 2076:3, 2089:11, 2123:10 BUILD [2] - 2119:21,	2121:1 BUILDING [7] - 2084:23, 2084:24, 2089:3, 2098:23, 2101:14, 2101:20, 2102:6 BUILDING [1] - 2088:25 BULK [1] - 2111:21 BUNCH [2] - 2085:2, 2109:8 BURDEN [18] - 2039:1, 2050:3, 2050:5, 2054:8, 2057:19, 2057:22, 2063:9, 2063:12, 2063:15, 2063:17, 2063:18, 2065:9, 2070:15, 2117:10, 2117:23, 2122:16, 2122:18 BURN [13] - 2089:4, 2089:5, 2089:8, 2089:12, 2089:15, 2089:18, 2089:20, 2089:25, 2090:1, 2090:5, 2090:23, 2099:10, 2112:1 BUSINESS [1] - 2060:1 BUY [4] - 2118:8, 2118:22, 2120:16, 2120:17 BY [8] - 2020:4, 2020:5, 2020:5, 2020:6, 2020:9, 2020:14, 2020:14, 2020:15 BYPRODUCTS [1] - 2098:1 BYRON [1] - 2020:4
C				
CACI [1] - 2036:2 CAL [2] - 2035:20, 2035:21 CALCULATE [3] - 2058:8, 2094:3, 2110:24 CALCULATION [1] - 2118:17 CALCULATIONS [2] - 2118:13, 2118:20 CALIFORNIA [13] - 2020:7, 2020:10, 2020:11, 2020:16, 2030:15, 2061:24, 2086:13, 2086:14, 2087:3, 2087:13,				

B

B.J [1] - 2093:22
BACKWASH [1] -
2120:12
BAILIFF [2] - 2069:12,

2088:3, 2096:15,
2123:17
CALIFORNIA [5] -
2019:2, 2019:15,
2019:25, 2023:2,
2125:7
CANDID [3] - 2075:8,
2096:10, 2106:7
CANDIDLY [1] -
2105:23
CANNOT [2] - 2078:2,
2091:19
CAPABLE [1] -
2098:18
CAPACITY [1] -
2114:23
CAPITAL [2] -
2119:14, 2119:15
CAPPED [1] - 2109:4
CAPTURING [1] -
2031:25
CAR [3] - 2120:17,
2120:18
CARCINOGEN [1] -
2086:2
CARE [8] - 2050:11,
2050:14, 2051:12,
2051:14, 2051:18,
2082:9, 2083:3,
2083:8
CAREFUL [6] -
2050:18, 2050:19,
2050:21, 2082:20,
2082:22, 2088:13
CAREFULLY [2] -
2027:10, 2099:21
CARRIED [1] -
2054:21
CARRYING [1] -
2104:16
CARTRIDGE [1] -
2120:11
CASE [93] - 2023:5,
2026:23, 2027:25,
2028:25, 2029:1,
2029:2, 2029:7,
2029:9, 2029:11,
2029:16, 2029:17,
2029:23, 2029:24,
2030:4, 2030:21,
2031:8, 2031:12,
2031:19, 2032:3,
2032:4, 2032:13,
2032:14, 2032:17,
2033:2, 2033:6,
2034:11, 2035:15,
2035:18, 2036:2,
2036:14, 2036:15,
2037:13, 2038:8,
2038:11, 2046:25,

2047:1, 2047:6,
2048:4, 2049:19,
2059:7, 2066:11,
2066:24, 2067:1,
2067:2, 2067:5,
2067:7, 2067:17,
2067:21, 2067:23,
2068:2, 2068:4,
2068:7, 2068:11,
2068:15, 2069:1,
2069:17, 2070:4,
2071:20, 2071:25,
2072:10, 2072:17,
2072:21, 2073:10,
2073:16, 2074:11,
2075:7, 2077:12,
2081:2, 2082:3,
2082:13, 2084:20,
2084:22, 2092:18,
2094:6, 2100:9,
2101:8, 2104:4,
2105:6, 2107:15,
2110:15, 2114:22,
2115:7, 2115:10,
2118:11, 2121:6,
2121:24, 2122:1,
2122:17, 2123:6,
2123:9, 2123:21,
2124:7
CASE [1] - 2019:6
CASES [3] - 2027:21,
2029:25, 2110:25
CATCH [1] - 2089:8
CATCH-ALL [1] -
2089:8
CAUSED [8] -
2049:16, 2053:17,
2054:13, 2054:18,
2057:1, 2060:12,
2060:22, 2063:1
CAUSES [1] - 2032:12
CAUSING [10] -
2051:5, 2051:7,
2053:8, 2056:17,
2057:7, 2058:5,
2058:18, 2058:20,
2059:18, 2117:5
CAVALIER [1] -
2078:13
CENTER [2] -
2058:13, 2101:9
CENTRAL [2] -
2019:2, 2125:7
CERTAIN [4] -
2027:18, 2083:13,
2090:4
CERTAINLY [16] -
2042:8, 2080:24,
2084:9, 2085:1,
2086:8, 2090:24,

2095:12, 2095:25,
2096:9, 2096:11,
2097:16, 2099:11,
2102:16, 2106:15,
2117:25, 2123:12
CERTIFICATE [1] -
2125:1
CERTIFY [1] - 2125:7
CETERA [1] - 2116:4
CHAIR [2] - 2081:21,
2108:6
CHANDALAR [1] -
2020:9
CHANGE [11] -
2024:15, 2025:1,
2025:8, 2025:16,
2025:22, 2032:12,
2043:1, 2066:18,
2066:21, 2100:13,
2119:24
CHANGED [4] -
2024:14, 2090:18,
2110:3, 2110:4
CHANGES [6] -
2040:6, 2042:16,
2043:9, 2043:20,
2044:20, 2045:8
CHARACTER [1] -
2053:20
CHARACTERIZATIO
N [1] - 2106:11
CHARACTERIZE [1] -
2099:14
CHARTS [2] - 2116:9,
2116:17
CHAT [1] - 2067:9
CHEMICAL [1] -
2027:19
CHEMICALS [19] -
2083:20, 2084:15,
2089:5, 2089:9,
2089:20, 2089:22,
2090:4, 2093:18,
2097:12, 2102:25,
2103:12, 2103:13,
2103:19, 2106:16,
2106:25, 2112:11,
2113:12, 2116:15,
2117:13
CHLORACNE [1] -
2086:3
CHLORIDE [1] -
2117:14
CHLORINATED [4] -
2083:12, 2083:23,
2085:22, 2087:2
CHRISTMAS [1] -
2079:17
CHRONIC [2] -
2085:5, 2085:19

CIRCLE [1] - 2092:17
CIRCUIT [2] - 2029:10,
2029:23
CITATION [1] -
2035:20
CITE [3] - 2035:6,
2038:7, 2080:18
CITED [11] - 2028:23,
2035:15, 2035:19,
2036:14, 2038:3,
2098:8, 2098:12,
2100:1, 2101:1,
2102:4, 2102:17
CITIES [1] - 2086:24
CITING [1] - 2087:21
CITIZEN [3] - 2097:2,
2103:5, 2123:17
CITIZENS [4] -
2077:22, 2082:8,
2090:15
CITY [2] - 2029:9,
2029:11
CITY [1] - 2029:20
CLAIM [1] - 2050:10
CLAIM [50] - 2029:6,
2030:17, 2030:18,
2031:24, 2032:8,
2032:9, 2032:20,
2032:21, 2032:25,
2033:15, 2033:17,
2033:19, 2033:22,
2034:8, 2034:10,
2034:18, 2034:22,
2035:9, 2036:5,
2036:16, 2036:23,
2049:23, 2049:25,
2050:1, 2050:3,
2050:5, 2050:7,
2050:23, 2051:1,
2052:3, 2052:5,
2052:7, 2055:2,
2055:15, 2055:18,
2055:21, 2056:18,
2056:20, 2058:2,
2058:14, 2059:1,
2060:7, 2065:9,
2065:13, 2107:5,
2121:16
CLAIMING [5] -
2036:7, 2036:17,
2036:21, 2038:20,
2062:25
CLAIMS [29] -
2028:21, 2029:14,
2029:16, 2030:23,
2033:14, 2034:4,
2034:7, 2037:5,
2041:16, 2042:1,
2049:19, 2049:21,
2049:22, 2050:2,

2050:24, 2052:6,
2054:24, 2055:20,
2056:19, 2057:18,
2058:1, 2058:12,
2060:5, 2061:12,
2063:11, 2070:15,
2072:6, 2081:2,
2082:5
CLARITA [4] - 2023:6,
2044:24, 2049:24,
2050:24
CLARITA [1] - 2019:5
CLASSIFIED [1] -
2086:2
CLEAN [6] - 2043:9,
2043:24, 2043:25,
2072:2, 2091:18,
2094:24
CLEANED [2] -
2085:10, 2103:7
CLEANING [1] -
2077:20
CLEAR [19] - 2025:22,
2027:8, 2031:7,
2036:3, 2036:10,
2037:8, 2037:11,
2063:8, 2063:16,
2063:18, 2063:20,
2065:7, 2065:10,
2080:12, 2081:20,
2092:19, 2103:14,
2122:21, 2122:22
CLEARLY [4] -
2032:19, 2082:24,
2113:4, 2118:8
CLERK [1] - 2023:5
CLERK [2] - 2023:18,
2042:15
CLICKER [1] -
2073:15
CLIENT [6] - 2030:2,
2031:13, 2072:5,
2078:22, 2123:19,
2123:24
CLIENT'S [5] - 2030:8,
2031:9, 2041:15,
2106:22, 2106:24
CLIENTS [1] - 2119:10
CLOSE [5] - 2045:17,
2046:14, 2090:2,
2110:1, 2117:12
CLOSED [2] - 2110:2
CLOSING [11] -
2023:19, 2046:18,
2062:18, 2070:11,
2070:13, 2070:18,
2070:19, 2070:21,
2071:14, 2072:23,
2124:8
CLOSURE [1] -

2041:2 CLUSTERS [1] - 2093:11 CODE [1] - 2098:13 CODE [1] - 2125:8 COLLAR [1] - 2079:20 COLLECTING [1] - 2110:6 COLOGNE [1] - 2038:7 COMBINED [1] - 2033:8 COMFORTABLE [2] - 2052:16, 2056:3 COMING [4] - 2091:4, 2097:8, 2103:24, 2112:25 COMMENCED [1] - 2094:19 COMMENT [1] - 2078:1 COMMENTARY [1] - 2067:21 COMMISSION [1] - 2087:13 COMMITMENT [1] - 2073:1 COMMITTED [2] - 2063:23, 2122:2 COMMON [2] - 2029:13, 2092:14 COMMUNICATE [5] - 2067:3, 2067:4, 2069:11, 2069:15, 2069:16 COMMUNICATING [1] - 2067:13 COMMUNICATIONS [1] - 2068:22 COMMUNITY [1] - 2057:11 COMPANIES [1] - 2077:21 COMPANY [1] - 2034:19 COMPANY [3] - 2049:5, 2096:7, 2113:22 COMPARATIVE [1] - 2057:25 COMPARED [1] - 2060:25 COMPATIBILITY [1] - 2054:20 COMPENSATE [1] - 2060:9 COMPENSATES [1] - 2062:12 COMPENSATION [2] - 2060:10, 2060:15	COMPENSATORY [1] - 2062:25 COMPETING [1] - 2061:5 COMPLAINT [2] - 2037:25, 2038:3 COMPLETE [5] - 2070:6, 2093:23, 2095:14, 2095:15, 2113:11 COMPLIANCE [1] - 2101:20 COMPLICATED [1] - 2043:3 COMPOUNDS [1] - 2097:9 COMPUTER [1] - 2067:8 CONCEALED [1] - 2065:1 CONCENTRATION [1] - 2104:19 CONCEPT [3] - 2027:17, 2049:3, 2049:9 CONCEPTS [2] - 2027:18, 2064:10 CONCERN [3] - 2031:22, 2086:14, 2101:23 CONCERNED [3] - 2027:24, 2095:17, 2119:20 CONCERNING [5] - 2042:7, 2060:3, 2064:10, 2065:18, 2069:16 CONCLUDE [1] - 2028:2 CONCLUDED [1] - 2029:7 CONCLUDES [2] - 2034:18, 2070:9 CONCLUSION [3] - 2034:20, 2108:10, 2108:19 CONCLUSIONS [1] - 2116:20 CONDITION [22] - 2051:13, 2051:23, 2052:2, 2052:12, 2052:22, 2052:25, 2053:17, 2054:25, 2055:3, 2055:6, 2055:8, 2055:11, 2055:14, 2055:24, 2056:5, 2056:8, 2060:24, 2061:5, 2083:4, 2094:14 CONDITIONS [3] -	2051:14, 2083:8, 2083:9 CONDUCT [35] - 2038:20, 2049:17, 2052:19, 2053:3, 2053:5, 2053:7, 2053:10, 2053:13, 2054:11, 2054:13, 2054:14, 2054:15, 2054:18, 2054:20, 2056:10, 2056:12, 2056:16, 2057:6, 2057:16, 2060:12, 2060:23, 2063:1, 2063:2, 2063:6, 2063:22, 2064:1, 2064:6, 2064:7, 2064:12, 2064:17, 2064:19, 2064:22, 2075:10, 2076:14 CONFER [2] - 2035:13, 2036:16 CONFERENCE [1] - 2125:12 CONFIRM [2] - 2044:13, 2106:15 CONFORM [4] - 2040:12, 2042:5, 2042:10, 2044:20 CONFORMANCE [1] - 2125:12 CONFORMED [1] - 2042:8 CONFORMS [1] - 2044:2 CONFUSING [1] - 2043:4 CONNECTED [5] - 2094:9, 2103:19, 2103:20, 2105:13, 2106:20 CONSCIENTIOUS [1] - 2066:17 CONSENT [4] - 2053:4, 2055:11, 2056:11, 2102:22 CONSEQUENCES [2] - 2064:16, 2064:18 CONSEQUENTLY [1] - 2102:5 CONSIDER [18] - 2027:5, 2031:23, 2040:23, 2047:17, 2048:13, 2051:8, 2051:18, 2053:13, 2053:15, 2054:11, 2057:10, 2057:14, 2057:16, 2059:24, 2060:23, 2062:14, 2082:24, 2117:6	CONSIDERATION [1] - 2078:10 CONSIDERED [2] - 2048:21, 2066:12 CONSIDERING [2] - 2028:7, 2048:2 CONSISTENT [2] - 2089:25, 2111:24 CONSTITUENTS [2] - 2084:10, 2102:10 CONSTITUTING [3] - 2063:22, 2064:1, 2064:6 CONSTRUCTION [2] - 2120:19 CONSULT [1] - 2069:18 CONSULTANT [6] - 2076:1, 2079:12, 2080:17, 2104:9, 2104:12, 2120:5 CONSULTING [1] - 2067:25 CONSUMING [1] - 2071:23 CONTACT [1] - 2067:19 CONTAIN [1] - 2114:18 CONTAINED [2] - 2035:8, 2099:1 CONTAINMENT [1] - 2081:23 CONTAINS [2] - 2023:19, 2106:25 CONTAMINANTS [3] - 2080:10, 2103:17, 2103:18 CONTAMINATE [1] - 2087:2 CONTAMINATED [8] - 2030:13, 2031:14, 2031:25, 2105:2, 2105:7, 2106:3, 2110:1, 2112:22 CONTAMINATING [1] - 2094:2 CONTAMINATION [50] - 2027:12, 2028:2, 2028:22, 2030:4, 2030:7, 2031:9, 2071:20, 2072:4, 2072:6, 2072:11, 2073:19, 2073:23, 2073:25, 2074:8, 2075:4, 2077:5, 2077:24, 2078:3, 2078:15, 2078:25, 2080:9, 2080:13, 2082:2,	2082:18, 2083:11, 2085:23, 2086:15, 2088:3, 2088:4, 2091:24, 2092:12, 2092:16, 2092:23, 2094:8, 2094:12, 2094:22, 2095:23, 2096:23, 2097:4, 2097:6, 2106:2, 2113:14, 2114:19, 2115:1, 2116:10, 2118:2, 2118:21, 2121:7, 2122:7 CONTEMPTIBLE [1] - 2064:23 CONTENDS [2] - 2061:14, 2062:8 CONTENTIONS [1] - 2065:13 CONTEXT [6] - 2027:5, 2029:3, 2032:3, 2035:4, 2045:8, 2074:11 CONTINGENCIES [1] - 2119:21 CONTINUE [3] - 2069:20, 2091:20, 2124:7 CONTOUR [4] - 2093:20, 2103:23, 2104:2, 2104:11 CONTRIBUTED [4] - 2051:8, 2058:2, 2058:13, 2117:6 CONTRIBUTORY [1] - 2057:24 CONTROL [6] - 2031:5, 2042:13, 2052:1, 2091:13, 2121:13, 2121:15 CONTROL [2] - 2097:7, 2097:24 CONTROLLED [4] - 2024:18, 2025:20, 2052:10, 2056:23 CONTROLS [1] - 2071:6 CONVEY [1] - 2027:6 CONVICTION [1] - 2065:12 CONVINCING [8] - 2063:8, 2063:16, 2063:18, 2063:21, 2065:8, 2065:10, 2122:21, 2122:22 COPY [6] - 2031:19, 2043:9, 2044:1, 2046:12, 2082:6, 2117:1 CORPORATE [9] -
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<p>2065:5, 2065:6, 2075:10, 2076:14, 2077:22, 2082:8, 2090:15, 2097:2, 2103:5</p> <p>CORPORATION [1] - 2019:8</p> <p>CORPORATION [5] - 2048:5, 2048:18, 2048:21, 2048:24, 2077:19</p> <p>CORPORATION [7] - 2023:6, 2048:19, 2048:20, 2049:4, 2072:10, 2101:25, 2121:10</p> <p>CORPORATIONS [2] - 2072:9, 2077:22</p> <p>CORPS [1] - 2105:19</p> <p>CORRECT [1] - 2125:9</p> <p>CORRECT [8] - 2024:1, 2024:2, 2024:20, 2025:18, 2026:17, 2027:16, 2044:18, 2076:17</p> <p>CORRECTED [2] - 2043:5, 2043:10</p> <p>CORRECTIONS [1] - 2043:12</p> <p>CORRECTLY [1] - 2035:1</p> <p>COST [16] - 2041:6, 2041:18, 2060:19, 2060:20, 2060:22, 2061:2, 2061:4, 2061:8, 2079:12, 2096:5, 2119:7, 2119:11, 2119:13, 2119:22, 2120:2, 2120:7</p> <p>COSTS [12] - 2061:1, 2077:15, 2079:10, 2080:9, 2119:5, 2119:14, 2119:15, 2119:17, 2119:19, 2120:3, 2120:6, 2120:10</p> <p>COUNSEL [10] - 2023:8, 2024:5, 2035:13, 2062:19, 2074:21, 2079:4, 2090:13, 2095:3, 2108:2, 2108:11</p> <p>COUNSEL [1] - 2020:1</p> <p>COUNT [1] - 2099:15</p> <p>COUNT [3] - 2069:25, 2100:20, 2107:25</p> <p>COUNTERPART [1] -</p>	<p>2078:6</p> <p>COUNTRY [1] - 2077:23</p> <p>COUNTS [1] - 2099:6</p> <p>COUNTY [4] - 2027:21, 2029:21, 2032:17, 2038:12</p> <p>COUPLE [6] - 2042:11, 2070:22, 2079:17, 2081:18, 2091:16, 2117:13</p> <p>COURSE [11] - 2038:22, 2047:10, 2066:16, 2090:7, 2104:20, 2112:4, 2114:19, 2115:1, 2118:15, 2121:15, 2122:22</p> <p>COURT [72] - 2019:1, 2019:24, 2023:13, 2023:20, 2024:4, 2024:16, 2024:21, 2024:23, 2025:6, 2025:13, 2025:16, 2025:19, 2025:24, 2026:7, 2026:19, 2028:10, 2029:1, 2029:11, 2029:15, 2029:23, 2030:16, 2031:6, 2031:11, 2031:15, 2031:20, 2033:2, 2033:13, 2033:18, 2034:7, 2034:16, 2034:25, 2035:6, 2035:12, 2035:19, 2035:23, 2036:8, 2036:12, 2036:25, 2037:10, 2039:16, 2039:21, 2039:24, 2040:8, 2040:17, 2040:20, 2041:1, 2041:9, 2041:12, 2041:14, 2041:20, 2041:23, 2042:1, 2042:25, 2043:6, 2043:11, 2043:15, 2043:23, 2044:7, 2044:9, 2044:16, 2044:19, 2044:23, 2045:13, 2046:5, 2046:9, 2081:14, 2124:3, 2124:12, 2124:15, 2125:6, 2125:19</p> <p>COURT [14] - 2032:6, 2032:23, 2046:4, 2065:24, 2066:6, 2068:16, 2068:17, 2069:2, 2069:17, 2095:20, 2103:25,</p>	<p>2112:6, 2123:10, 2124:11</p> <p>COURT [26] - 2024:5, 2028:1, 2029:2, 2029:7, 2029:25, 2031:16, 2034:17, 2035:6, 2035:7, 2036:14, 2037:14, 2038:23, 2039:5, 2039:18, 2039:24, 2040:12, 2043:23, 2044:14, 2045:2, 2062:16, 2067:19, 2069:8, 2070:1, 2081:15, 2083:22</p> <p>COURT'S [3] - 2040:7, 2045:19, 2082:6</p> <p>COURTROOM [5] - 2066:2, 2068:21, 2070:8, 2076:3, 2111:8</p> <p>COVERS [1] - 2118:25</p> <p>CRAZY [2] - 2094:18, 2094:23</p> <p>CREATE [1] - 2086:12</p> <p>CREATED [10] - 2051:23, 2052:2, 2052:7, 2052:12, 2052:22, 2055:3, 2055:8, 2055:21, 2055:24, 2085:12</p> <p>CREATES [1] - 2083:13</p> <p>CREDIBILITY [1] - 2048:13</p> <p>CREDIBLE [1] - 2105:21</p> <p>CRITICAL [1] - 2034:9</p> <p>CROSS [1] - 2040:19</p> <p>CROSS- DEFENDANTS [1] - 2040:19</p> <p>CRR [2] - 2019:23, 2125:19</p> <p>CRUEL [1] - 2064:20</p> <p>CRUZ [3] - 2042:15, 2043:7, 2043:8</p> <p>CRYSTAL [2] - 2027:8, 2037:11</p> <p>CSR [2] - 2019:23, 2125:19</p> <p>CUP [1] - 2088:11</p> <p>CUSTOM [2] - 2057:15, 2057:17</p> <p>CUSTOMS [2] - 2057:10, 2057:12</p> <p>CV [2] - 2019:7, 2023:5</p> <p>CW-1 [3] - 2112:14, 2112:15, 2112:21</p>	<p>D</p> <p>DAMAGE [6] - 2034:21, 2036:7, 2045:5, 2063:19, 2085:20, 2086:4</p> <p>DAMAGED [1] - 2061:13</p> <p>DAMAGES [46] - 2028:13, 2033:21, 2033:23, 2034:15, 2035:1, 2035:5, 2043:2, 2043:18, 2044:2, 2045:4, 2045:8, 2045:10, 2045:15, 2045:18, 2045:22, 2058:7, 2059:23, 2059:24, 2060:3, 2060:4, 2060:10, 2060:11, 2060:15, 2060:17, 2060:18, 2061:7, 2061:11, 2062:4, 2062:11, 2062:12, 2062:20, 2062:25, 2063:3, 2063:14, 2118:7, 2118:16, 2120:24, 2121:6, 2121:23, 2121:25, 2122:18, 2122:20, 2122:24</p> <p>DAN [1] - 2079:16</p> <p>DANGEROUS [3] - 2052:23, 2064:16, 2083:20</p> <p>DANIEL [1] - 2020:15</p> <p>DATA [9] - 2093:8, 2093:14, 2093:15, 2093:16, 2093:23, 2098:24, 2102:16, 2108:6, 2116:24</p> <p>DATE [2] - 2070:7, 2076:24</p> <p>DATED [1] - 2125:15</p> <p>DATED [1] - 2076:9</p> <p>DATES [1] - 2099:17</p> <p>DAUS [1] - 2110:23</p> <p>DAWSON [2] - 2023:25, 2087:9</p> <p>DAY [2] - 2019:13, 2125:15</p> <p>DAYS [2] - 2079:17, 2081:18</p> <p>DEAL [10] - 2032:18, 2032:23, 2032:24, 2075:15, 2077:17, 2107:3, 2121:6, 2121:7, 2122:6</p> <p>DEALER [1] - 2120:17</p> <p>DEALING [5] -</p>	<p>2029:12, 2029:16, 2032:6, 2076:7, 2077:5</p> <p>DEALS [1] - 2026:4</p> <p>DEALT [4] - 2032:7, 2032:9, 2032:21</p> <p>DEATH [1] - 2085:19</p> <p>DECADES [4] - 2073:19, 2092:14, 2117:4, 2118:1</p> <p>DECEIT [2] - 2072:12, 2075:10</p> <p>DECEMBER [3] - 2019:14, 2023:1, 2125:15</p> <p>DECEPTION [5] - 2072:12, 2076:13, 2093:15, 2103:9, 2122:1</p> <p>DECIDE [17] - 2047:5, 2048:11, 2050:21, 2058:21, 2059:19, 2060:7, 2060:8, 2060:21, 2063:1, 2063:2, 2063:5, 2066:11, 2069:1, 2077:9, 2096:4, 2120:21, 2121:20</p> <p>DECIDED [8] - 2026:9, 2026:11, 2026:20, 2028:11, 2063:4, 2068:15, 2122:6</p> <p>DECIDING [2] - 2051:17, 2057:11</p> <p>DECISION [9] - 2029:10, 2029:21, 2032:25, 2050:8, 2065:5, 2066:17, 2066:20, 2072:20, 2077:13</p> <p>DECISION-MAKING [1] - 2065:5</p> <p>DECISIONS [2] - 2065:6, 2123:11</p> <p>DEEP [1] - 2092:25</p> <p>DEFECTS [1] - 2086:3</p> <p>DEFENDANT [1] - 2023:15</p> <p>DEFENDANT [2] - 2035:15, 2048:20</p> <p>DEFENDANTS [1] - 2040:19</p> <p>DEFENDANTS [2] - 2019:9, 2020:12</p> <p>DEFENSE [9] - 2039:3, 2045:2, 2045:21, 2050:5, 2057:22, 2058:11, 2065:10, 2065:13, 2070:19</p>
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DEFENSES [3] - 2050:4, 2057:21, 2063:12 DEFER [1] - 2045:17 DEFINE [1] - 2103:23 DEFINITION [1] - 2024:14 DEFINITIONS [1] - 2064:9 DEGREASER [2] - 2085:14, 2085:17 DEGREASERS [3] - 2085:8, 2085:10, 2085:11 DEGREASING [2] - 2089:24, 2114:12 DEGREE [1] - 2077:2 DELAY [5] - 2072:12, 2074:7, 2082:3, 2103:9, 2121:25 DELAYED [3] - 2038:1, 2093:5, 2117:4 DELIBERATE [5] - 2043:25, 2076:15, 2120:22, 2121:4, 2123:25 DELIBERATELY [1] - 2064:17 DELIBERATION [2] - 2039:8, 2066:5 DELIBERATIONS [7] - 2065:19, 2065:22, 2065:23, 2067:3, 2069:11, 2069:20, 2070:7 DELIVERED [2] - 2076:4, 2123:4 DELIVERING [2] - 2100:15 DENIAL [4] - 2072:12, 2082:3, 2103:9, 2121:25 DENIED [6] - 2045:22, 2069:2, 2074:8, 2074:9, 2078:24, 2094:10 DENY [2] - 2045:19, 2074:7 DENYING [2] - 2045:13, 2094:11 DEPARTMENT [1] - 2091:19 DEPARTMENT [2] - 2096:16, 2096:23 DEPONENT [1] - 2048:6 DEPOSED [1] - 2048:8 DEPOSITION [5] -	2084:8, 2084:12, 2085:17, 2108:24, 2115:17 DEPUTY [1] - 2066:2 DERIVED [1] - 2096:15 DESCRIBE [3] - 2043:17, 2052:4, 2081:17 DESCRIBED [5] - 2076:4, 2079:18, 2086:16, 2086:19, 2105:24 DESCRIBING [2] - 2076:10, 2099:18 DESCRIPTION [1] - 2097:25 DESCRIPTION [1] - 2022:3 DESERVES [1] - 2048:2 DESIGN [1] - 2120:18 DESIGNATES [1] - 2048:5 DESPICABLE [5] - 2064:12, 2064:20, 2064:22, 2075:9, 2076:14 DESPISED [1] - 2064:24 DESTRUCTION [1] - 2053:21 DETAIL [3] - 2059:9, 2102:25, 2116:2 DETAILED [3] - 2109:21, 2116:19, 2120:9 DETECTED [1] - 2117:15 DETECTING [4] - 2093:4, 2116:12, 2116:14 DETECTION [2] - 2080:3, 2102:5 DETECTIONS [5] - 2104:24, 2107:16, 2107:17, 2108:12, 2109:12 DETERMINATION [3] - 2038:23, 2039:6, 2058:7 DETERMINE [8] - 2038:15, 2053:14, 2054:10, 2057:13, 2060:20, 2061:1, 2061:3, 2065:6 DETERMINING [5] - 2048:13, 2053:11, 2059:24, 2098:18, 2102:9	DEVELOPED [1] - 2039:9 DEVICES [1] - 2068:4 DICKEY [1] - 2087:23 DICTIONARIES [1] - 2067:25 DIFFERENCE [2] - 2034:5, 2034:6 DIFFERENCES [1] - 2032:11 DIFFERENT [13] - 2027:1, 2032:19, 2034:7, 2034:13, 2036:6, 2038:9, 2049:20, 2056:14, 2063:9, 2105:12, 2111:1, 2120:20 DIFFERENTLY [2] - 2032:16, 2081:8 DIFFERS [1] - 2071:10 DIFFICULT [2] - 2032:6, 2038:14 DIFFICULTY [1] - 2051:24 DIGGING [1] - 2076:18 DILIGENTLY [1] - 2066:8 DILUTION [1] - 2087:15 DIRECT [1] - 2034:17 DIRECTION [10] - 2058:25, 2059:5, 2085:2, 2093:19, 2094:7, 2103:23, 2104:3, 2105:8, 2105:24, 2112:11 DIRECTIONS [1] - 2122:23 DIRECTLY [4] - 2036:1, 2036:11, 2036:13 DIRECTORS [7] - 2048:23, 2048:25, 2063:24, 2064:3, 2064:5, 2122:3, 2122:13 DISAGREE [2] - 2040:2, 2040:5 DISAGREEMENT [2] - 2043:18, 2043:19 DISCHARGED [2] - 2069:25, 2087:14 DISCLAIMER [1] - 2032:3 DISCLOSE [1] - 2069:25 DISCLOSURES [1] - 2075:19 DISCOMFORT [1] -	2053:22 DISCOVER [3] - 2051:14, 2083:8, 2094:22 DISCOVERED [1] - 2094:15 DISCOVERS [1] - 2072:10 DISCOVERY [1] - 2038:21 DISCUSS [1] - 2067:18 DISCUSSED [4] - 2040:22, 2066:13, 2068:3, 2068:5 DISCUSSES [1] - 2030:22 DISCUSSING [4] - 2030:21, 2067:2, 2067:7, 2082:25 DISCUSSION [2] - 2066:19, 2117:9 DISLIKES [1] - 2047:4 DISMISS [3] - 2041:6, 2041:18, 2041:24 DISMISSED [1] - 2042:2 DISPERSES [1] - 2092:23 DISPERSION [1] - 2113:12 DISPOSAL [7] - 2090:9, 2090:24, 2091:6, 2097:15, 2097:21, 2099:12, 2099:17 DISPOSE [1] - 2114:11 DISPOSED [3] - 2088:7, 2099:8, 2099:21 DISPUTE [8] - 2078:20, 2078:21, 2079:10, 2081:4, 2094:14, 2104:14, 2105:9 DISPUTES [2] - 2079:6, 2082:1 DISREGARD [5] - 2064:13, 2064:15, 2064:21, 2071:5, 2071:11 DISSENTING [1] - 2039:20 DISSUADE [1] - 2066:6 DISTINGUISH [2] - 2029:4, 2029:17 DISTINGUISHABLE [1] - 2031:11	DISTRIBUTION [2] - 2109:15, 2116:4 DISTRICT [2] - 2027:21, 2029:21 DISTRICT [1] - 2031:24 DISTRICT [5] - 2019:1, 2019:2, 2019:3, 2125:6, 2125:7 DISTRUST [1] - 2047:19 DISTURBED [2] - 2053:3, 2056:8 DIVERGED [1] - 2059:14 DIVIDE [1] - 2094:5 DIVIDING [2] - 2092:18, 2092:21 DIVISION [1] - 2101:25 DIVISION [1] - 2019:2 DO [1] - 2125:7 DOCUMENT [4] - 2080:19, 2100:21, 2101:1, 2115:16 DOCUMENTATION [1] - 2109:19 DOCUMENTS [10] - 2076:6, 2084:5, 2088:16, 2097:19, 2097:20, 2097:21, 2099:22, 2100:10, 2108:13, 2123:9 DOG [1] - 2105:21 DOLLARS [1] - 2120:25 DONE [13] - 2047:9, 2057:13, 2064:13, 2066:2, 2081:7, 2094:5, 2095:22, 2097:3, 2097:5, 2103:3, 2107:10, 2109:16, 2110:24 DOTS [3] - 2093:4, 2107:23, 2108:18 DOUBT [1] - 2065:16 DOWN [13] - 2049:21, 2064:23, 2073:10, 2077:16, 2077:23, 2079:14, 2084:18, 2085:4, 2093:24, 2104:20, 2104:22, 2112:22, 2118:8 DOWNGRADIENT [2] - 2084:19, 2102:2 DOWNHILL [1] - 2072:9 DR [24] - 2040:6, 2085:21, 2086:10, 2086:16, 2087:12,
---	---	--	--	--

2089:6, 2089:23, 2093:12, 2098:4, 2099:25, 2100:12, 2100:21, 2104:19, 2105:3, 2105:16, 2108:11, 2109:1, 2109:17, 2110:23, 2117:18, 2117:19, 2119:8, 2120:22, 2120:25 DRAFT [1] - 2091:20 DRAW [5] - 2104:12, 2107:18, 2108:9, 2108:19, 2113:5 DRAWING [1] - 2106:3 DRAWS [1] - 2110:20 DREW [1] - 2113:9 DRILL [1] - 2049:21 DRINKING [4] - 2061:16, 2062:4, 2072:2, 2123:18 DRIVING [1] - 2079:18 DROPPED [1] - 2091:17 DROPS [1] - 2032:3 DROUGHT [1] - 2072:3 DTSC [2] - 2074:20, 2096:20 DUE [1] - 2039:2 DUMP [3] - 2088:17, 2088:19, 2102:20 DUMPED [4] - 2088:24, 2088:25, 2089:7, 2093:18 DUMPING [19] - 2082:14, 2086:8, 2088:12, 2088:21, 2088:23, 2089:24, 2090:2, 2090:4, 2090:11, 2090:20, 2091:3, 2091:4, 2092:5, 2097:17, 2097:18, 2099:9, 2114:4, 2114:6, 2117:3 DURING [7] - 2038:25, 2062:22, 2062:23, 2067:3, 2068:5, 2068:13, 2069:10 DUTY [2] - 2046:24, 2046:25 DWARFS [1] - 2114:24	EARLY [2] - 2082:17, 2086:13 EAST [1] - 2075:3 EDGE [3] - 2104:1, 2104:20, 2105:3 EDLIN [1] - 2020:13 EDUCATION [2] - 2047:24, 2048:3 EFFECT [3] - 2066:21, 2078:2, 2090:16 EFFECTS [3] - 2086:1, 2086:3, 2087:16 EIGHT [2] - 2053:7, 2101:19 EITHER [4] - 2031:4, 2056:24, 2107:20, 2120:17 ELECT [1] - 2065:22 ELECTRONIC [1] - 2067:8 ELEMENT [2] - 2034:9, 2052:25 ELEMENTS [4] - 2024:10, 2024:25, 2050:23, 2052:4 ELEVATION [2] - 2103:22, 2104:2 ELEVATIONS [2] - 2084:20, 2084:21 ELICITED [2] - 2026:24, 2027:12 ELIMINATE [1] - 2034:23 EMISSION [1] - 2086:24 EMPHASIZED [2] - 2075:14, 2108:11 EMPLOYEE [1] - 2065:3 EMPLOYEES [5] - 2048:7, 2048:22, 2048:25, 2049:17, 2107:11 EMPLOYER [2] - 2049:16, 2067:14 EMPLOYMENT [1] - 2049:18 END [4] - 2034:13, 2054:25, 2055:13, 2112:12 ENDED [2] - 2089:5, 2089:9 ENDS [1] - 2090:5 ENGAGED [1] - 2063:6 ENGAGEMENT [1] - 2102:25 ENGAGING [1] - 2054:15 ENGINEERING [1] -	2096:6 ENGINEERS [1] - 2105:19 ENJOYMENT [7] - 2052:16, 2053:1, 2053:18, 2053:25, 2054:1, 2054:5, 2056:3 ENSURING [1] - 2102:5 ENTER [1] - 2057:1 ENTERING [1] - 2107:19 ENTIRELY [2] - 2031:7, 2104:8 ENTITLED [1] - 2068:25 ENTITLED [1] - 2125:11 ENTITY [3] - 2060:1, 2061:25, 2100:14 ENTRY [2] - 2057:4, 2057:8 ENVIRONMENT [2] - 2090:11, 2091:3 EPA [1] - 2074:19, 2074:20, 2078:4, 2078:11, 2078:15, 2078:16, 2094:21, 2098:21, 2099:6, 2099:16, 2122:8 EQUALLY [1] - 2123:2 EQUIPMENT [4] - 2085:9, 2120:9, 2120:10, 2121:14 ERIC [1] - 2020:15 ERIC [2] - 2020:20, 2078:17 ERROR [2] - 2042:22, 2043:3 ERRORS [1] - 2043:10 ESPECIALLY [4] - 2088:2, 2088:4, 2090:22, 2093:2 ESSENCE [1] - 2032:7 ESSENTIAL [3] - 2024:24, 2052:4, 2120:13 ESSENTIALLY [6] - 2034:16, 2035:1, 2037:22, 2038:16, 2038:25, 2084:17 ESTABLISH [5] - 2050:25, 2052:7, 2055:2, 2055:21, 2056:20 ESTIMATE [4] - 2077:16, 2119:13, 2119:25, 2120:23 ESTIMATED [1] -	2096:5 ESTIMATORS [1] - 2120:2 ET [4] - 2019:8, 2023:7, 2026:5, 2116:4 EVALUATE [1] - 2048:10 EVENLY [1] - 2123:5 EVENT [1] - 2111:12 EVENTUALLY [3] - 2079:1, 2079:2, 2079:23 EVERYWHERE [3] - 2092:22, 2092:23, 2112:20 EVIDENCE [1] - 2022:2 EVIDENCE [158] - 2023:24, 2026:24, 2027:1, 2027:2, 2027:3, 2027:11, 2027:15, 2027:16, 2027:25, 2028:5, 2030:7, 2031:1, 2033:2, 2039:9, 2040:5, 2046:10, 2046:23, 2046:25, 2047:6, 2047:11, 2047:18, 2047:19, 2047:20, 2048:4, 2050:6, 2050:7, 2050:8, 2057:20, 2057:23, 2061:6, 2062:20, 2062:22, 2063:8, 2063:13, 2063:16, 2063:18, 2063:21, 2065:8, 2065:10, 2065:11, 2065:15, 2065:20, 2066:13, 2066:22, 2066:24, 2068:15, 2070:23, 2070:24, 2070:25, 2071:1, 2071:2, 2071:4, 2071:21, 2071:23, 2072:13, 2072:14, 2072:17, 2072:19, 2072:25, 2073:2, 2073:3, 2073:4, 2073:9, 2074:1, 2074:4, 2074:7, 2074:12, 2074:13, 2074:14, 2074:25, 2075:7, 2076:8, 2079:25, 2082:12, 2082:15, 2082:25, 2083:5, 2083:18, 2085:12, 2085:25, 2086:7, 2087:10,	2087:22, 2088:8, 2088:14, 2090:17, 2090:19, 2090:22, 2091:1, 2091:3, 2091:10, 2092:2, 2092:13, 2092:20, 2093:21, 2094:6, 2095:7, 2095:20, 2096:4, 2096:10, 2096:12, 2097:1, 2098:3, 2098:7, 2099:3, 2099:24, 2100:8, 2101:11, 2102:15, 2102:20, 2103:4, 2103:9, 2103:14, 2105:5, 2106:13, 2107:7, 2107:9, 2108:9, 2108:12, 2108:22, 2110:14, 2110:21, 2111:3, 2113:18, 2114:9, 2114:10, 2114:12, 2115:9, 2115:22, 2115:24, 2117:2, 2117:25, 2118:7, 2118:12, 2119:12, 2121:5, 2121:10, 2121:11, 2121:19, 2121:21, 2121:22, 2122:1, 2122:4, 2122:8, 2122:21, 2123:1, 2123:2, 2123:7, 2123:10, 2123:12, 2123:25 EVIDENTIARY [2] - 2047:14, 2048:9 EVOLVING [1] - 2038:2 EXACT [2] - 2060:14, 2118:16 EXACTLY [6] - 2079:18, 2090:3, 2093:8, 2102:2, 2105:24, 2120:23 EXAMPLE [6] - 2034:9, 2077:3, 2091:8, 2096:2, 2104:10, 2108:7 EXCEPT [4] - 2067:2, 2069:15, 2095:24, 2110:10 EXCERPTS [1] - 2027:7 EXCLUDE [1] - 2045:22 EXCLUSIVE [1] - 2031:4 EXCUSE [9] - 2047:16, 2057:15,
E				
E-MAIL [5] - 2041:17, 2041:21, 2043:8, 2067:9, 2080:15				

<p>2066:18, 2080:20, 2080:24, 2087:25, 2107:8, 2110:13, 2113:11</p> <p>EXCUSED [1] - 2068:10</p> <p>EXCUSES [2] - 2082:3, 2107:1</p> <p>EXECUTION [1] - 2091:21</p> <p>EXERCISE [1] - 2026:14</p> <p>EXERCISES [1] - 2065:4</p> <p>EXHIBIT [15] - 2075:24, 2083:16, 2084:6, 2089:1, 2096:19, 2097:23, 2098:11, 2099:4, 2099:10, 2101:13, 2102:22, 2105:18, 2112:14, 2115:23, 2119:12</p> <p>EXHIBIT [5] - 2084:16, 2105:15, 2105:16, 2111:4, 2120:8</p> <p>EXHIBITS [3] - 2104:4, 2118:19, 2118:24</p> <p>EXHIBITS [1] - 2022:1</p> <p>EXIST [4] - 2052:12, 2052:23, 2055:24, 2100:11</p> <p>EXISTED [1] - 2055:6</p> <p>EXPECT [2] - 2082:8, 2089:21</p> <p>EXPECTED [2] - 2027:11, 2051:16</p> <p>EXPENSE [2] - 2054:8, 2060:23</p> <p>EXPENSIVE [2] - 2094:17, 2119:21</p> <p>EXPERIENCE [3] - 2047:24, 2048:3, 2106:9</p> <p>EXPERIENCED [1] - 2112:6</p> <p>EXPERT [8] - 2087:8, 2094:3, 2110:17, 2111:7, 2112:18, 2117:11, 2120:1</p> <p>EXPERTS [6] - 2047:21, 2047:22, 2098:5, 2103:22, 2106:18, 2108:17</p> <p>EXPLAIN [5] - 2031:16, 2048:16, 2063:17, 2095:11, 2116:2</p> <p>EXPLAINED [14] - 2068:13, 2070:2,</p>	<p>2085:22, 2089:6, 2089:23, 2093:22, 2094:16, 2112:16, 2115:11, 2115:19, 2118:23, 2120:8, 2122:17, 2123:3</p> <p>EXPLAINING [1] - 2094:21</p> <p>EXPLANATORY [1] - 2121:9</p> <p>EXPLORE [1] - 2039:4</p> <p>EXPOSED [2] - 2066:25, 2069:8</p> <p>EXPOSURE [3] - 2085:6, 2085:18, 2085:19</p> <p>EXTEND [2] - 2033:16, 2033:22</p> <p>EXTENDED [1] - 2087:5</p> <p>EXTENDS [4] - 2033:14, 2033:19, 2033:21, 2033:22</p> <p>EXTENT [6] - 2046:20, 2052:1, 2053:16, 2054:8, 2082:17, 2102:9</p> <p>EXTRACT [4] - 2033:4, 2033:10, 2061:15, 2106:24</p> <p>EXTRACTED [2] - 2062:3, 2062:7</p> <p>EXTRACTING [2] - 2031:24, 2034:19</p> <p>EXTRACTION [6] - 2032:4, 2033:8, 2033:9, 2034:20, 2114:17, 2114:24</p> <p>EXTREME [4] - 2108:7, 2109:11, 2110:11</p> <p>EYE [1] - 2049:20</p>	<p>2093:7, 2099:9, 2109:18</p> <p>FACTOR [19] - 2051:5, 2051:6, 2051:7, 2051:9, 2053:8, 2056:17, 2057:7, 2058:5, 2058:18, 2058:20, 2059:18, 2117:2, 2117:5, 2117:7, 2117:11, 2117:24, 2121:11</p> <p>FACTORIES [1] - 2026:5</p> <p>FACTORS [8] - 2024:20, 2051:18, 2053:13, 2057:14, 2082:23, 2082:24, 2083:17, 2084:1</p> <p>FACTS [9] - 2031:8, 2046:19, 2046:25, 2047:1, 2071:8, 2081:11</p> <p>FACTUAL [3] - 2024:25, 2052:4, 2065:12</p> <p>FACTUALLY [1] - 2039:4</p> <p>FAIL [1] - 2085:18</p> <p>FAIL-SAFE [1] - 2085:18</p> <p>FAILED [11] - 2054:25, 2055:13, 2083:5, 2099:13, 2099:15, 2099:16, 2101:25, 2107:4, 2110:13, 2110:14, 2113:16</p> <p>FAILING [5] - 2050:16, 2052:11, 2052:19, 2055:23, 2082:11</p> <p>FAILS [6] - 2034:22, 2050:18, 2051:12, 2064:17, 2082:21, 2083:3</p> <p>FAILURE [5] - 2050:12, 2050:14, 2080:24, 2082:9, 2082:16</p> <p>FAIR [4] - 2039:4, 2068:25, 2069:3, 2078:23</p> <p>FAIRLY [1] - 2034:9</p> <p>FAIRNESS [1] - 2069:7</p> <p>FALL [1] - 2060:5</p> <p>FAMILIAR [3] - 2047:15, 2119:10, 2120:10</p> <p>FAMILY [1] - 2067:13</p> <p>FAR [3] - 2092:11, 2092:15, 2095:16</p>	<p>FASHION [1] - 2039:12</p> <p>FASHIONED [1] - 2073:15</p> <p>FAST [1] - 2113:1</p> <p>FASTER [4] - 2105:12, 2111:12, 2111:18</p> <p>FAULT [7] - 2057:25, 2058:12, 2058:16, 2058:17, 2058:19, 2059:17, 2121:9</p> <p>FAVOR [1] - 2123:8</p> <p>FAVORITE [1] - 2108:23</p> <p>FAYE [2] - 2078:5, 2122:8</p> <p>FEATHER [1] - 2123:7</p> <p>FEDERAL [3] - 2019:24, 2125:5, 2125:19</p> <p>FEDERAL [1] - 2079:3</p> <p>FEET [10] - 2104:22, 2110:18, 2110:20, 2111:9, 2111:14, 2111:24, 2112:1, 2113:7, 2113:8</p> <p>FELLOW [13] - 2067:2, 2074:18, 2074:19, 2084:11, 2095:1, 2095:2, 2095:9, 2105:18, 2107:22, 2108:18, 2109:13, 2117:20, 2124:9</p> <p>FELLOWS [1] - 2091:16</p> <p>FEW [3] - 2074:15, 2093:4, 2112:9</p> <p>FIDE [1] - 2120:2</p> <p>FIELD [1] - 2120:1</p> <p>FIGHT [1] - 2105:21</p> <p>FIGUEROA [1] - 2020:6</p> <p>FIGURE [4] - 2038:18, 2078:7, 2084:25, 2105:16</p> <p>FILE [2] - 2023:19, 2038:22</p> <p>FILED [1] - 2079:9</p> <p>FILES [1] - 2098:22</p> <p>FILL [1] - 2059:5</p> <p>FILTERS [1] - 2120:12</p> <p>FINAL [1] - 2046:12</p> <p>FINALLY [2] - 2070:20, 2115:11</p> <p>FINE [4] - 2024:22, 2025:15, 2039:24, 2043:22</p> <p>FIRM [1] - 2065:11</p> <p>FIRST [18] - 2023:22,</p>	<p>2028:13, 2033:20, 2038:25, 2048:17, 2049:20, 2049:23, 2057:24, 2061:12, 2065:19, 2065:20, 2072:22, 2075:12, 2103:16, 2110:3, 2110:13, 2114:5, 2118:10</p> <p>FIVE [7] - 2053:2, 2054:8, 2056:11, 2057:6, 2100:4, 2112:3, 2113:14</p> <p>FIX [2] - 2107:20, 2110:11</p> <p>FLANGE [1] - 2109:8</p> <p>FLOOR [2] - 2020:7, 2020:10</p> <p>FLOW [7] - 2072:8, 2097:4, 2103:23, 2104:13, 2105:8, 2105:23, 2112:11</p> <p>FLOWING [4] - 2093:25, 2094:1, 2105:6, 2106:2</p> <p>FLOWS [3] - 2071:19, 2104:15, 2111:12</p> <p>FLURRY [1] - 2112:24</p> <p>FOCUSED [2] - 2030:6, 2032:1</p> <p>FOLKS [3] - 2085:16, 2091:23, 2109:7</p> <p>FOLLOW [10] - 2047:2, 2069:4, 2071:11, 2074:14, 2077:15, 2093:14, 2097:18, 2101:5, 2121:21</p> <p>FOLLOW-UP [1] - 2101:5</p> <p>FOLLOWING [17] - 2046:3, 2051:1, 2051:18, 2052:8, 2053:15, 2055:4, 2055:22, 2056:21, 2057:15, 2058:3, 2058:15, 2063:8, 2070:11, 2091:8, 2092:6, 2097:11, 2124:10</p> <p>FOLLOWS [1] - 2116:4</p> <p>FOOTNOTE [3] - 2031:23, 2032:22, 2037:14</p> <p>FOR [6] - 2020:3, 2020:12, 2022:2, 2125:6</p> <p>FOREGOING [1] - 2125:9</p>
F				
<p>FACE [1] - 2077:23</p> <p>FACEBOOK [1] - 2067:11</p> <p>FACILITY [9] - 2081:25, 2097:12, 2098:24, 2099:23, 2100:5, 2101:2, 2101:3, 2115:25</p> <p>FACILITY'S [3] - 2096:22, 2098:2, 2098:18</p> <p>FACT [10] - 2030:6, 2038:23, 2062:24, 2065:1, 2070:3, 2072:8, 2090:20,</p>				

FOREPERSON ^[1] - 2066:4 FORGETTING ^[1] - 2111:4 FORGOT ^[1] - 2100:6 FORK ^[1] - 2075:3 FORM ^[19] - 2023:19, 2040:25, 2042:7, 2042:11, 2042:19, 2043:17, 2044:5, 2046:13, 2058:23, 2058:24, 2059:4, 2059:5, 2059:10, 2059:21, 2070:2, 2070:6, 2072:16, 2121:8, 2124:13 FORMAL ^[3] - 2080:2, 2080:7, 2080:21 FORMAT ^[1] - 2125:11 FORMER ^[1] - 2115:24 FORMS ^[1] - 2067:12 FORTH ^[5] - 2061:6, 2080:3, 2082:7, 2084:16, 2099:10 FOUR ^[6] - 2052:25, 2054:4, 2055:12, 2056:9, 2057:5, 2089:6 FOURTH ^[1] - 2056:18 FRAMES ^[1] - 2073:14 FRANCISCO ^[2] - 2020:11, 2020:16 FRANKLY ^[1] - 2073:10 FRAUD ^[6] - 2063:7, 2063:23, 2064:2, 2064:7, 2064:25, 2122:2 FRED ^[2] - 2020:6, 2020:14 FRED ^[1] - 2023:14 FREE ^[2] - 2052:15, 2056:2 FRYER ^[1] - 2020:19 FRYER ^[1] - 2023:17 FUDACZ ^[1] - 2020:6 FUDACZ ^[1] - 2023:11 FULFILL ^[1] - 2108:2 FULLY ^[2] - 2062:12, 2066:13 FUMES ^[1] - 2086:25 FUNDAMENTAL ^[1] - 2030:23 FURIOUS ^[1] - 2113:1 FUTURE ^[1] - 2080:9	2023:16 GALLAGHER ^[2] - 2020:13, 2020:14 GALLONS ^[4] - 2083:14, 2114:18, 2114:25, 2115:1 GAME ^[1] - 2115:17 GAYNOR ^[2] - 2023:24, 2087:9 GAYNOR ^[1] - 2023:25 GEE ^[2] - 2020:4, 2039:15 GEE ^[2] - 2023:10, 2037:19 GENERAL ^[7] - 2038:3, 2048:16, 2056:14, 2060:3, 2074:21, 2095:3, 2102:20 GENERALLY ^[6] - 2025:25, 2045:12, 2047:15, 2054:17, 2105:8, 2119:5 GENERATED ^[1] - 2098:1 GENERATOR ^[1] - 2100:23 GENTLEMAN ^[1] - 2075:13 GENTLEMEN ^[4] - 2046:7, 2070:12, 2071:18, 2124:3 GEOLOGICAL ^[1] - 2086:17 GEOLOGIST ^[2] - 2083:10, 2092:7 GEOLOGY ^[1] - 2072:8 GIVEN ^[7] - 2025:21, 2026:14, 2039:3, 2048:3, 2049:14, 2071:12, 2090:22 GLIMPSE ^[1] - 2123:11 GORDON ^[7] - 2074:21, 2076:21, 2095:4, 2095:6, 2102:21, 2102:23, 2122:5 GRAB ^[1] - 2031:19 GREASE ^[2] - 2085:9 GREAT ^[3] - 2073:24, 2092:18, 2094:5 GREATER ^[2] - 2053:25, 2054:2 GROUND ^[14] - 2062:3, 2083:24, 2086:9, 2088:4, 2088:12, 2088:17,	2088:22, 2088:23, 2088:25, 2089:7, 2090:2, 2097:17, 2114:6, 2114:13 GROUNDWATER ^[79] - 2028:21, 2028:22, 2028:24, 2029:5, 2030:7, 2030:12, 2030:13, 2031:9, 2031:14, 2034:19, 2061:2, 2061:15, 2061:16, 2061:22, 2062:5, 2071:19, 2072:4, 2072:5, 2072:8, 2084:20, 2085:23, 2086:9, 2086:15, 2087:3, 2092:8, 2092:10, 2093:5, 2093:16, 2093:19, 2093:23, 2094:2, 2094:4, 2094:7, 2094:13, 2094:15, 2094:24, 2095:8, 2096:1, 2096:5, 2096:16, 2096:21, 2098:10, 2098:12, 2098:17, 2098:19, 2098:24, 2102:7, 2102:11, 2102:12, 2102:13, 2103:23, 2104:3, 2104:13, 2104:15, 2104:16, 2104:23, 2105:2, 2105:6, 2105:11, 2105:20, 2105:23, 2106:2, 2106:14, 2106:17, 2106:19, 2106:22, 2106:23, 2106:25, 2110:24, 2111:8, 2111:12, 2111:24, 2112:5, 2112:7, 2112:11, 2113:13, 2113:14 GROUNDWATER ^[1] - 2104:6 GROUP ^[1] - 2087:4 GROWING ^[1] - 2101:23 GUESS ^[2] - 2060:16, 2118:18 GUIDE ^[2] - 2065:18, 2083:17 GUIDELINES ^[2] - 2091:20, 2091:21 GUY ^[3] - 2076:22, 2108:1, 2119:1 GUYS ^[1] - 2097:13	H HALF ^[2] - 2112:1, 2112:2 HAND ^[1] - 2093:14 HANDFUL ^[4] - 2093:2, 2093:3, 2104:25, 2114:16 HANDLE ^[2] - 2091:9, 2100:5 HANDLING ^[1] - 2090:25 HARD ^[2] - 2082:6, 2117:1 HARDSHIP ^[1] - 2064:20 HARM ^[51] - 2045:11, 2049:16, 2050:15, 2051:5, 2051:7, 2051:8, 2051:10, 2051:16, 2051:20, 2051:21, 2051:23, 2051:25, 2052:2, 2052:6, 2053:8, 2053:9, 2053:12, 2053:14, 2053:16, 2053:20, 2053:21, 2054:2, 2054:9, 2055:20, 2056:9, 2056:13, 2056:14, 2056:17, 2057:7, 2058:2, 2058:5, 2058:14, 2058:18, 2058:21, 2059:19, 2060:9, 2060:11, 2060:13, 2060:16, 2060:18, 2060:19, 2060:20, 2060:22, 2063:2, 2065:2, 2082:10, 2117:5, 2117:7, 2117:8, 2118:17, 2119:6 HARMED ^[5] - 2028:5, 2050:25, 2051:3, 2053:6, 2057:5 HARMFUL ^[2] - 2052:13, 2055:25 HAZARDOUS ^[22] - 2075:15, 2075:16, 2076:11, 2077:21, 2077:23, 2084:10, 2084:17, 2091:9, 2094:22, 2095:13, 2098:13, 2098:16, 2099:14, 2099:18, 2099:19, 2100:5, 2100:15, 2100:19, 2102:10 HEAD ^[4] - 2074:18, 2076:22, 2107:11,	2109:12 HEALTH ^[2] - 2096:16, 2096:24 HEALTH ^[3] - 2052:13, 2055:25, 2086:1 HEAP ^[1] - 2123:14 HEAR ^[18] - 2024:11, 2031:20, 2037:20, 2039:8, 2041:1, 2062:18, 2068:10, 2070:13, 2070:16, 2070:18, 2070:20, 2075:9, 2087:9, 2095:19, 2104:5, 2107:2, 2120:10, 2120:14 HEARD ^[47] - 2037:3, 2037:6, 2037:19, 2037:20, 2040:6, 2041:7, 2041:19, 2046:23, 2047:21, 2063:10, 2065:19, 2070:25, 2071:1, 2074:17, 2078:18, 2079:2, 2079:16, 2079:25, 2080:16, 2081:3, 2081:5, 2081:9, 2081:17, 2081:18, 2081:24, 2082:5, 2082:12, 2084:8, 2084:12, 2084:19, 2085:17, 2087:10, 2087:24, 2089:13, 2093:22, 2095:19, 2099:20, 2104:5, 2105:16, 2107:2, 2109:24, 2112:24, 2113:17, 2115:5, 2119:8, 2120:15, 2124:8 HEARING ^[2] - 2046:10, 2063:9 HEAVILY ^[2] - 2029:3, 2032:1 HEAVY ^[1] - 2107:16 HELD ^[1] - 2125:10 HELD ^[4] - 2035:7, 2046:3, 2124:1, 2124:10 HELP ^[1] - 2083:17 HEREBY ^[1] - 2125:7 HESITATED ^[1] - 2119:17 HIGH ^[5] - 2104:19, 2105:7, 2107:13, 2107:17, 2119:19 HIGHER ^[4] - 2063:15, 2065:14, 2084:20, 2111:11 HIGHLIGHTED ^[1] -
G GAIN ^[1] - 2068:21 GALLAGHER ^[1] -				

2024:6 HIGHLY ^[1] - 2065:12 HIMSELF ^[1] - 2079:16 HIRE ^[2] - 2092:9, 2120:18 HIRED ^[3] - 2083:10, 2092:7, 2095:9 HISTORY ^[5] - 2037:25, 2085:22, 2086:10, 2088:2, 2103:11 HIT ^[1] - 2113:6 HOG ^[1] - 2091:11 HOG-OUT ^[1] - 2091:11 HOKKANEN ^[7] - 2040:6, 2093:12, 2104:19, 2105:3, 2110:23, 2117:18, 2117:19 HOKKANEN'S ^[1] - 2105:16 HOLD ^[4] - 2036:15, 2041:9, 2073:18, 2123:19 HOLDINGS ^[1] - 2032:17 HOME ^[1] - 2073:25 HONEST ^[2] - 2066:21, 2108:25 HONESTLY ^[1] - 2029:18 HONOR ^[47] - 2023:12, 2023:14, 2023:18, 2024:2, 2024:13, 2024:19, 2024:22, 2025:4, 2025:10, 2025:18, 2025:22, 2026:2, 2026:18, 2028:8, 2028:16, 2029:8, 2029:14, 2029:19, 2031:1, 2031:18, 2032:5, 2033:20, 2034:12, 2035:3, 2035:5, 2035:14, 2035:24, 2036:1, 2036:17, 2036:24, 2039:15, 2039:19, 2039:20, 2039:22, 2040:16, 2041:5, 2041:22, 2041:25, 2042:9, 2043:13, 2043:16, 2044:3, 2044:12, 2045:3, 2071:15, 2071:17, 2081:10 HONOR'S ^[1] - 2037:9 HONORABLE ^[1] -	2019:3 HOPE ^[2] - 2036:10, 2077:24 HOT ^[1] - 2079:19 HUGE ^[3] - 2104:24, 2116:15, 2117:15 HUGHTO ^[11] - 2085:21, 2086:10, 2086:16, 2087:12, 2089:6, 2089:23, 2098:4, 2099:25, 2100:12, 2100:21, 2102:2 HUIE ^[1] - 2020:13 HULA ^[4] - 2090:6, 2092:2, 2101:21, 2102:19 HUMAN ^[1] - 2086:2 HUNDREDS ^[5] - 2088:8, 2104:22, 2113:7, 2118:1 HUSBAND ^[1] - 2078:8 HYDRAULICALLY ^[1] - 2102:1 HYDRAULICS ^[1] - 2109:13 HYDROGEOLOGIC ^[2] - 2027:16, 2095:14 HYDROGEOLOGICA L ^[1] - 2027:17	IMPACT ^[1] - 2098:18 IMPACTED ^[2] - 2111:11, 2118:8 IMPAIRMENT ^[1] - 2053:21 IMPARTIAL ^[1] - 2069:1 IMPLEMENT ^[1] - 2098:17 IMPORTANT ^[10] - 2035:4, 2066:15, 2069:4, 2072:1, 2072:19, 2073:7, 2104:2, 2114:1, 2118:6 IMPOSED ^[2] - 2074:5, 2123:20 IMPOSES ^[1] - 2039:1 IMPOUNDMENT ^[11] - 2083:11, 2083:14, 2084:14, 2092:8, 2098:14, 2098:17, 2101:14, 2101:16, 2101:18, 2102:8 IMPOUNDMENTS ^[2] - 2084:23, 2098:23 IMPRACTICALITY ^[1] - 2054:22 IMPRECISE ^[1] - 2042:18 IMPROPER ^[1] - 2068:21 IN ^[3] - 2125:6, 2125:10, 2125:11 INACCURATE ^[1] - 2068:23 INACTIVE ^[1] - 2098:2 INADEQUATE ^[1] - 2102:8 INCAPABLE ^[1] - 2102:9 INCINERATED ^[2] - 2089:14, 2089:21 INCLINATION ^[2] - 2037:9, 2045:19 INCLINED ^[3] - 2036:25, 2037:3, 2037:21 INCLUDE ^[3] - 2024:23, 2060:11, 2078:5 INCLUDES ^[2] - 2067:7, 2116:3 INCLUDING ^[9] - 2023:24, 2061:17, 2062:10, 2067:10, 2068:8, 2069:23, 2082:8, 2082:15, 2087:2 INCOMPLETE ^[1] -	2068:23 INCONSISTENT ^[1] - 2071:11 INCONVENIENCE ^[1] - 2054:9 INCORRECT ^[1] - 2028:19 INDECENT ^[2] - 2052:14, 2056:1 INDEPENDENT ^[1] - 2065:4 INDEX ^[2] - 2021:1, 2022:1 INDICATED ^[1] - 2028:11 INDICATING ^[1] - 2047:10 INDICATION ^[1] - 2108:14 INDISCRIMINATE ^[4] - 2090:10, 2090:11, 2091:2, 2097:18 INDIVIDUAL ^[1] - 2060:1 INDUSTRIAL ^[4] - 2054:7, 2087:1, 2087:14, 2088:12 INDUSTRIAL ^[2] - 2058:13, 2101:9 INDUSTRY ^[1] - 2087:5 INFERENCE ^[3] - 2077:4, 2090:20, 2114:5 INFERENCES ^[1] - 2071:1 INFLUENCED ^[2] - 2047:4, 2068:22 INFORMATION ^[15] - 2061:20, 2067:1, 2067:22, 2068:21, 2068:23, 2069:2, 2069:8, 2097:11, 2098:1, 2098:4, 2098:5, 2099:14, 2101:3, 2116:22 INJURY ^[4] - 2036:4, 2062:5, 2062:6, 2064:12 INNOCUOUS ^[3] - 2075:19, 2075:22, 2076:11 INSIDE ^[1] - 2066:5 INSIGHT ^[1] - 2078:12 INSPECTION ^[1] - 2092:1 INSPECTOR ^[1] - 2098:21 INSTAGRAM ^[1] - 2067:11	INSTALL ^[1] - 2102:1 INSTALLATION ^[1] - 2096:16 INSTALLED ^[2] - 2102:3, 2112:9 INSTEAD ^[2] - 2096:14, 2119:3 INSTRUCT ^[2] - 2046:24, 2087:24 INSTRUCTED ^[5] - 2042:19, 2042:22, 2071:10, 2083:22, 2113:21 INSTRUCTING ^[2] - 2026:14, 2039:1 INSTRUCTION ^[5] - 2024:24, 2025:5, 2026:1, 2026:15, 2028:1 INSTRUCTION ^[22] - 2026:4, 2026:8, 2028:7, 2028:9, 2031:22, 2035:17, 2036:4, 2036:6, 2037:4, 2037:9, 2037:21, 2038:16, 2039:18, 2040:5, 2040:9, 2059:12, 2063:19, 2065:7, 2082:6, 2084:4, 2114:8, 2118:15 INSTRUCTIONS ^[35] - 2024:6, 2026:12, 2040:13, 2040:22, 2040:25, 2041:3, 2041:10, 2041:11, 2042:5, 2042:10, 2046:12, 2046:13, 2046:14, 2046:15, 2046:18, 2046:19, 2046:22, 2047:9, 2049:22, 2060:2, 2062:13, 2065:18, 2066:24, 2068:14, 2070:9, 2070:11, 2074:23, 2082:7, 2084:2, 2091:6, 2091:7, 2091:9, 2116:25, 2118:5, 2121:24 INTEND ^[1] - 2023:23 INTENDING ^[2] - 2056:25, 2065:2 INTENT ^[1] - 2064:11 INTENTIONAL ^[1] - 2052:20 INTENTIONALLY ^[2] - 2056:24, 2064:25 INTEREST ^[18] - 2026:15, 2028:11,
	I			
	IDEA ^[2] - 2049:2, 2083:22 IDENTICAL ^[1] - 2034:14 IDENTIFICATION ^[1] - 2022:2 IDENTIFIED ^[11] - 2086:21, 2088:9, 2105:23, 2105:25, 2109:23, 2111:5, 2119:7, 2119:14, 2120:3, 2120:25 IDENTIFY ^[1] - 2097:5 IGNORANCE ^[2] - 2047:15, 2087:24 IGNORE ^[1] - 2046:21 IGNORED ^[1] - 2091:7 ILSE ^[1] - 2020:9 IMAGE ^[3] - 2083:13, 2089:11, 2089:14 IMAGINE ^[1] - 2075:5 IMMEDIATE ^[1] - 2102:5 IMMEDIATELY ^[2] - 2069:9, 2104:25			

2028:14, 2028:15, 2028:18, 2030:2, 2030:19, 2031:1, 2032:15, 2034:10, 2044:14, 2061:13, 2061:15, 2061:17, 2062:2, 2062:5, 2062:8, 2062:9 INTERESTED [1] - 2087:6 INTERESTING [2] - 2104:5, 2104:18 INTERESTS [5] - 2025:25, 2027:13, 2061:6, 2061:14, 2061:21 INTERFERE [2] - 2052:16, 2056:3 INTERFERED [2] - 2053:1, 2053:17 INTERFERENCE [3] - 2053:18, 2054:13, 2054:19 INTERNAL [1] - 2092:1 INTERNATIONAL [1] - 2096:6 INTERNET [3] - 2067:9, 2067:25, 2068:4 INTERPRET [1] - 2032:15 INTERPRETATION [1] - 2096:2 INTERRUPT [1] - 2075:24 INTERSECTS [1] - 2071:8 INTERVENING [1] - 2085:25 INTRODUCE [3] - 2023:23, 2027:1, 2027:2 INTRODUCED [1] - 2027:3 INTRODUCING [1] - 2027:2 INTRODUCTION [1] - 2060:4 INVADED [4] - 2030:2, 2053:25, 2054:2, 2054:5 INVASION [2] - 2054:3, 2054:23 INVESTIGATE [11] - 2095:22, 2095:24, 2107:4, 2107:5, 2107:15, 2108:4, 2110:10, 2110:11, 2110:13, 2110:14,	2113:16 INVESTIGATED [5] - 2107:17, 2109:3, 2109:23, 2110:8, 2115:20 INVESTIGATION [19] - 2068:1, 2068:20, 2095:14, 2095:15, 2095:17, 2103:6, 2105:18, 2107:10, 2107:11, 2107:15, 2108:14, 2108:20, 2108:21, 2109:11, 2109:16, 2109:18, 2115:12, 2116:19, 2116:20 INVITE [1] - 2046:13 INVOLVE [1] - 2031:9 INVOLVED [6] - 2053:21, 2060:24, 2067:15, 2068:8, 2122:14, 2124:7 INVOLVES [2] - 2030:3, 2067:1 INVOLVING [2] - 2078:21 IS [2] - 2125:9, 2125:11 ISSUE [34] - 2026:10, 2026:16, 2026:20, 2026:25, 2027:8, 2030:9, 2030:17, 2031:21, 2035:5, 2036:9, 2036:13, 2036:20, 2037:11, 2037:16, 2037:22, 2039:4, 2040:15, 2041:2, 2042:6, 2042:8, 2042:9, 2044:2, 2044:3, 2045:1, 2045:15, 2045:18, 2063:4, 2063:14, 2072:2, 2081:8, 2082:2, 2109:23 ISSUES [10] - 2026:5, 2038:14, 2040:21, 2040:24, 2042:6, 2042:21, 2043:17, 2045:3, 2067:1, 2081:6 ITEM [2] - 2027:11, 2060:11 ITSELF [3] - 2030:11, 2057:17, 2066:1	JIM [4] - 2084:8, 2084:11, 2101:17, 2109:6 JISA [3] - 2084:8, 2084:11, 2101:17 JMOL [7] - 2026:11, 2026:13, 2026:16, 2027:5, 2045:4, 2045:14, 2045:17 JMOLS [1] - 2026:4 JOE [8] - 2076:20, 2076:22, 2076:23, 2077:1, 2078:1, 2091:23, 2122:4, 2123:22 JOHN [3] - 2076:21, 2122:4, 2122:10 JOKE [1] - 2078:14 JOKED [1] - 2091:24 JOURNAL [1] - 2087:21 JR [2] - 2019:3, 2020:14 JUDGE [6] - 2074:24, 2079:3, 2081:5, 2087:24, 2117:1, 2122:17 JUDGE [1] - 2019:3 JUDGED [1] - 2047:25 JUDGMENT [2] - 2062:21, 2065:4 JUDICIAL [1] - 2125:12 JUMP [1] - 2085:24 JUNE [5] - 2076:9, 2076:24, 2091:23, 2098:22, 2122:5 JUROR [6] - 2065:23, 2069:6, 2069:7, 2069:12, 2070:5 JURORS [8] - 2042:23, 2043:4, 2066:9, 2066:13, 2066:20, 2067:3, 2068:10, 2124:9 JURY [1] - 2046:8 JURY [39] - 2023:21, 2026:12, 2026:14, 2028:2, 2034:18, 2038:17, 2039:12, 2040:13, 2040:18, 2040:24, 2041:9, 2041:11, 2042:10, 2042:18, 2042:19, 2043:2, 2043:25, 2044:15, 2044:25, 2045:23, 2046:4, 2046:6, 2046:12, 2046:16, 2062:23, 2065:20, 2065:22,	2065:24, 2067:17, 2069:1, 2069:14, 2069:16, 2069:23, 2071:18, 2072:24, 2074:23, 2083:1, 2094:19, 2124:11 JUSTIFIES [1] - 2063:2 JUSTIFYING [1] - 2095:16	2077:1, 2077:6, 2077:17, 2090:24, 2094:23, 2095:2 LANGUAGE [1] - 2024:9 LARDIERE [11] - 2020:20, 2023:16, 2078:17, 2079:19, 2079:22, 2080:1, 2080:22, 2081:17, 2081:20, 2095:4, 2120:5 LARDIERE'S [1] - 2081:12 LARGE [1] - 2117:15 LARGELY [1] - 2026:13 LAST [9] - 2024:5, 2024:8, 2028:12, 2037:2, 2039:6, 2041:17, 2072:15, 2118:3, 2120:6 LASTED [1] - 2053:19 LASTING [1] - 2087:16 LATE [2] - 2100:12, 2112:9 LATEST [1] - 2024:5 LAUNDRY [1] - 2038:3 LAW [27] - 2026:23, 2028:19, 2028:25, 2029:13, 2029:15, 2029:16, 2037:10, 2038:4, 2039:9, 2046:20, 2046:24, 2047:1, 2047:2, 2047:15, 2047:16, 2048:21, 2068:8, 2071:8, 2071:10, 2071:11, 2087:12, 2087:13, 2087:23, 2087:24, 2090:16, 2090:25 LAWS [2] - 2086:13, 2087:23 LAWSUIT [1] - 2048:20 LAWYERS [7] - 2046:17, 2059:8, 2068:9, 2070:23, 2115:8, 2115:15, 2121:19 LEAK [1] - 2101:18 LEAKING [2] - 2101:16, 2101:17 LEAKS [1] - 2096:11 LEARN [1] - 2068:2 LEARNED [8] - 2071:19, 2072:7, 2072:9, 2072:11,
	J JEOPARDIZES [1] - 2069:7		L L.A [1] - 2038:12 LABORATORY [1] - 2107:12 LADIES [4] - 2046:7, 2070:12, 2071:18, 2124:3 LAID [1] - 2043:18 LAND [18] - 2025:11, 2028:15, 2028:19, 2030:11, 2031:2, 2031:5, 2032:15, 2033:3, 2033:5, 2053:1, 2054:1, 2055:1, 2055:5, 2057:9, 2061:17, 2062:8, 2062:9, 2087:14 LANDFILL [1] - 2089:19 LANDFILLS [11] - 2075:4, 2075:5, 2075:15, 2076:10,	

2072:12, 2083:9, 2087:25, 2098:9 LEASE [2] - 2042:12, 2121:12 LEASED [4] - 2024:17, 2025:20, 2052:9, 2056:22 LEAST [5] - 2031:21, 2045:19, 2045:20, 2072:22, 2102:1 LEAVE [1] - 2044:10 LEAVES [1] - 2065:11 LECHLER [11] - 2093:22, 2105:17, 2111:16, 2111:19, 2112:16, 2112:23, 2115:5, 2115:11, 2115:18, 2115:23, 2123:15 LED [1] - 2074:19 LEFT [1] - 2106:2 LEGAL [1] - 2060:5 LEGALLY [1] - 2039:5 LESERMAN [2] - 2109:6, 2109:12 LESS [1] - 2043:3 LETTER [2] - 2080:1, 2080:23 LEVELS [4] - 2096:23, 2096:24, 2105:1, 2122:17 LIABILITIES [1] - 2086:21 LIABILITY [8] - 2048:16, 2048:17, 2049:3, 2049:9, 2078:24, 2083:23, 2122:18, 2123:22 LIABLE [2] - 2049:7, 2113:23 LIFE [2] - 2052:16, 2056:3 LIGHT [2] - 2026:23, 2061:5 LIKELIHOOD [1] - 2051:20 LIKELY [8] - 2045:19, 2107:25, 2116:5, 2116:6, 2117:20, 2122:19, 2123:13 LIMIT [2] - 2037:4, 2080:3 LIMITATION [1] - 2035:1 LIMITED [4] - 2040:9, 2067:10, 2068:8, 2087:4 LINE [3] - 2043:2, 2092:18, 2092:21 LINEAR [2] - 2110:18,	2111:8 LINER [4] - 2084:13, 2084:18, 2085:3 LINES [6] - 2093:20, 2103:23, 2104:2, 2104:11, 2115:22, 2115:24 LINKEDIN [1] - 2067:11 LIQUIDS [3] - 2097:16, 2097:22 LIST [2] - 2038:3, 2100:4 LISTED [3] - 2058:22, 2059:20, 2097:22 LISTEN [1] - 2067:20 LISTENED [2] - 2066:14, 2090:13 LITANY [1] - 2082:1 LITIGATE [3] - 2107:5, 2107:15, 2110:10 LITIGATION [1] - 2048:8 LIVER [2] - 2085:20, 2086:4 LIVING [2] - 2119:9, 2120:1 LLP [2] - 2020:4, 2020:9 LOCALITY [4] - 2054:5, 2054:6, 2054:19, 2054:21 LOCATED [2] - 2061:18, 2062:9 LOCATION [5] - 2025:4, 2027:14, 2051:19, 2054:7, 2088:25 LOCATIONS [2] - 2025:2, 2025:7 LONG-LASTING [1] - 2087:16 LONGTIME [2] - 2080:16, 2120:5 LOOK [26] - 2024:3, 2026:21, 2026:23, 2027:7, 2027:9, 2033:25, 2034:12, 2036:2, 2038:20, 2046:15, 2072:20, 2072:23, 2084:3, 2093:17, 2093:19, 2093:25, 2094:7, 2095:19, 2096:3, 2112:10, 2115:13, 2116:10, 2121:19, 2123:25 LOOKED [10] - 2037:24, 2064:23, 2076:6, 2096:20,	2098:15, 2100:2, 2107:12, 2108:12, 2113:2, 2116:18 LOOKING [4] - 2035:16, 2082:17, 2112:13 LOOKS [1] - 2109:8 LOS [3] - 2019:15, 2019:25, 2023:2 LOS [1] - 2020:7 LOSE [2] - 2123:5, 2123:21 LOSS [3] - 2053:21, 2061:7, 2078:3 LOST [1] - 2081:21 LOUTTIT [9] - 2074:21, 2074:22, 2075:1, 2075:2, 2076:21, 2095:4, 2102:21, 2102:23, 2122:5 LOWER [2] - 2084:21, 2111:10 LUCE [2] - 2085:16, 2088:20	2112:25, 2113:2 MARKETS [1] - 2119:24 MASNADA [2] - 2079:16, 2119:4 MASSIVE [4] - 2088:4, 2089:19, 2105:25, 2114:13 MATERIAL [2] - 2024:8, 2065:1 MATERIALS [5] - 2068:1, 2088:25, 2090:23, 2105:5, 2109:19 MATH [1] - 2111:25 MATT [2] - 2020:19, 2080:6 MATTER [9] - 2032:19, 2032:20, 2033:24, 2067:18, 2071:23, 2076:14, 2076:15, 2114:5, 2124:7 MATTER [1] - 2125:11 MATTERS [2] - 2048:7, 2072:2 MCGUANE [1] - 2020:5 MEAN [12] - 2024:9, 2027:6, 2030:24, 2034:3, 2038:14, 2060:1, 2077:9, 2079:4, 2113:7, 2115:11, 2117:18, 2123:1 MEANING [1] - 2053:16 MEANS [11] - 2032:15, 2047:5, 2050:6, 2054:14, 2064:11, 2064:19, 2064:25, 2065:8, 2065:10, 2067:9, 2123:1 MEASURE [2] - 2116:24, 2121:6 MEDIA [4] - 2067:12, 2067:14, 2067:21, 2068:11 MEET [1] - 2080:4 MEETING [2] - 2076:24, 2122:5 MEETS [1] - 2123:13 MEMBER [3] - 2065:22, 2069:14, 2069:16 MEMBERS [2] - 2067:14, 2069:13 MEMO [19] - 2075:14, 2075:23, 2075:24, 2075:25, 2076:4,	2076:5, 2076:9, 2076:16, 2076:25, 2084:6, 2089:2, 2090:2, 2095:3, 2095:11, 2096:8, 2097:1, 2097:17, 2098:20, 2103:2 MEMORY [2] - 2071:3, 2071:5 MEMOS [2] - 2114:2, 2123:10 MENTION [1] - 2072:17 MENTIONED [3] - 2028:4, 2071:7, 2087:9 MENTIONING [1] - 2059:9 MERGER [1] - 2031:4 MERITS [1] - 2067:5 MESS [1] - 2091:11 MESSAGE [1] - 2023:22 MESSAGING [1] - 2067:9 MESSED [3] - 2101:7, 2101:10, 2101:11 MET [4] - 2076:20, 2076:21, 2077:4, 2117:22 METAL [1] - 2076:11 MICEVYCH [1] - 2023:10 MICHAEL [1] - 2020:14 MICROPHONE [1] - 2043:15 MIDST [1] - 2039:7 MIGHT [8] - 2027:11, 2029:2, 2045:12, 2061:2, 2066:3, 2078:6, 2090:10, 2123:22 MIGRATED [1] - 2115:2 MIGRATION [5] - 2030:5, 2084:9, 2095:13, 2102:9, 2113:4 MIKE [2] - 2109:13, 2121:13 MILD [2] - 2085:5, 2085:19 MILLION [7] - 2077:16, 2079:8, 2119:16, 2119:19, 2120:4, 2121:1, 2121:5 MIND [6] - 2027:7, 2075:6, 2075:11,
M				
MACHINE [2] - 2085:15, 2085:18 MAGIC [1] - 2079:8 MAIL [5] - 2041:17, 2041:21, 2043:8, 2067:9, 2080:15 MAIN [2] - 2042:9, 2054:14 MALICE [8] - 2063:6, 2063:22, 2064:1, 2064:6, 2064:10, 2064:11, 2075:9, 2122:2 MANAGEMENT [5] - 2091:22, 2091:24, 2097:18, 2099:19 MANAGERS [1] - 2064:3 MANAGING [6] - 2063:24, 2064:3, 2064:5, 2065:3, 2122:3, 2122:13 MANIFESTS [5] - 2099:21, 2100:1, 2100:2, 2100:3, 2100:14 MANNER [1] - 2038:17 MANUFACTURING [2] - 2086:11, 2097:25 MAP [1] - 2104:19 MAPS [3] - 2098:25,				

<p>2083:13, 2089:11, 2124:8</p> <p>MINISTER [1] - 2078:8</p> <p>MINOR [1] - 2032:11</p> <p>MINUS [1] - 2023:19</p> <p>MINUTE [6] - 2039:6, 2099:20, 2107:12, 2114:18, 2114:25, 2115:1</p> <p>MIRACULOUSLY [1] - 2102:12</p> <p>MIRANDA [4] - 2019:23, 2125:5, 2125:18, 2125:19</p> <p>MIRANDAALGORRI @GMAIL.COM [1] - 2019:25</p> <p>MISCELLANEOUS [1] - 2120:12</p> <p>MISLEADING [1] - 2068:23</p> <p>MISREPRESENTED [1] - 2065:1</p> <p>MISSING [5] - 2100:3, 2100:18, 2100:22, 2100:25, 2101:2</p> <p>MISSTATE [2] - 2046:20, 2071:2</p> <p>MISTAKE [2] - 2091:17, 2111:14</p> <p>MIXING [1] - 2109:14</p> <p>MODERN [1] - 2078:6</p> <p>MOMENT [5] - 2023:17, 2035:11, 2037:1, 2042:4, 2046:1</p> <p>MONDAY [1] - 2109:2</p> <p>MONEY [5] - 2060:8, 2077:15, 2077:19, 2121:2, 2122:15</p> <p>MONITORING [39] - 2092:8, 2092:11, 2092:22, 2092:24, 2093:2, 2093:4, 2093:6, 2093:24, 2094:13, 2094:15, 2094:24, 2095:8, 2095:17, 2096:1, 2096:5, 2096:17, 2098:8, 2098:10, 2098:12, 2098:17, 2098:24, 2099:2, 2099:4, 2102:1, 2102:4, 2102:13, 2102:17, 2103:8, 2104:23, 2106:6, 2106:14, 2112:8, 2112:18, 2112:20, 2112:21, 2113:6, 2113:10, 2113:13,</p>	<p>2116:21</p> <p>MONTHS [2] - 2119:22, 2119:23</p> <p>MORNING [11] - 2023:9, 2023:13, 2023:14, 2023:15, 2023:20, 2023:23, 2046:7, 2046:8, 2071:18, 2103:24, 2124:4</p> <p>MOST [6] - 2075:4, 2096:11, 2108:7, 2109:11, 2110:10, 2120:21</p> <p>MOTION [1] - 2035:16</p> <p>MOUNTAIN [1] - 2079:8</p> <p>MOVE [3] - 2042:23, 2084:17, 2084:19</p> <p>MOVED [1] - 2045:7</p> <p>MOVEMENT [2] - 2087:21, 2111:23</p> <p>MOVIES [1] - 2066:1</p> <p>MOVING [2] - 2111:18, 2111:19</p> <p>MR [62] - 2023:9, 2023:14, 2024:2, 2024:13, 2024:19, 2024:22, 2025:10, 2025:15, 2025:18, 2025:22, 2026:2, 2026:18, 2028:8, 2028:16, 2029:8, 2029:13, 2029:18, 2030:9, 2030:24, 2031:10, 2031:13, 2031:18, 2032:5, 2033:7, 2033:16, 2033:20, 2034:12, 2034:23, 2035:3, 2035:10, 2035:14, 2035:22, 2035:24, 2036:10, 2036:17, 2037:7, 2039:15, 2039:19, 2039:22, 2040:4, 2040:15, 2040:18, 2040:24, 2041:5, 2041:8, 2041:11, 2041:13, 2041:17, 2041:21, 2041:24, 2043:13, 2043:16, 2044:3, 2044:8, 2044:17, 2045:3, 2071:15, 2081:10, 2081:12, 2081:17, 2094:20, 2124:13</p> <p>MS [5] - 2025:4, 2042:9, 2043:1, 2043:8, 2044:12</p>	<p>MULTIPLE [2] - 2115:22, 2115:23</p> <p>MUST [46] - 2028:13, 2047:2, 2047:3, 2047:5, 2050:6, 2050:21, 2051:1, 2051:8, 2051:13, 2052:5, 2052:8, 2055:3, 2055:22, 2056:20, 2058:3, 2058:14, 2058:21, 2059:13, 2059:19, 2059:22, 2060:8, 2060:11, 2060:16, 2060:19, 2060:21, 2060:23, 2061:3, 2061:8, 2061:12, 2062:6, 2062:11, 2062:20, 2063:2, 2063:5, 2063:7, 2063:20, 2065:11, 2066:10, 2066:11, 2066:23, 2066:25, 2067:17, 2083:7, 2113:11, 2117:7, 2118:17</p> <p>MYSTERY [3] - 2075:25, 2076:5, 2076:25</p>	<p>2044:15, 2045:24, 2077:8, 2081:15, 2085:2, 2091:2, 2092:8, 2093:16, 2112:10, 2113:14, 2114:15, 2118:11, 2119:10</p> <p>NEEDED [2] - 2024:3, 2101:6</p> <p>NEEDS [3] - 2031:14, 2085:9, 2085:18</p> <p>NEGATIVE [2] - 2095:16, 2095:25</p> <p>NEGLIGENCE [1] - 2050:10</p> <p>NEGLIGENCE [43] - 2028:20, 2029:24, 2030:15, 2033:14, 2033:15, 2033:17, 2033:19, 2033:25, 2034:2, 2034:10, 2034:24, 2035:2, 2035:9, 2036:5, 2036:16, 2037:12, 2037:18, 2038:16, 2049:8, 2049:23, 2050:12, 2050:14, 2050:23, 2050:25, 2051:4, 2058:1, 2058:5, 2058:12, 2058:17, 2058:19, 2059:1, 2059:17, 2081:6, 2082:7, 2082:9, 2084:4, 2091:10, 2091:12, 2091:14, 2113:24, 2121:9, 2122:19</p> <p>NEGLIGENT [13] - 2050:16, 2050:17, 2051:2, 2051:11, 2052:21, 2058:4, 2058:16, 2082:11, 2082:19, 2083:2, 2083:19, 2091:8, 2121:10</p> <p>NEGLIGENTLY [1] - 2056:25</p> <p>NEIGHBORS [2] - 2096:9, 2103:7</p> <p>NEVER [9] - 2036:19, 2045:12, 2087:10, 2098:3, 2098:4, 2098:5, 2106:13, 2107:17, 2109:8</p> <p>NEW [6] - 2024:7, 2024:9, 2090:16, 2090:25, 2092:4, 2092:7</p> <p>NEWS [2] - 2067:20, 2067:23</p>	<p>NEXT [8] - 2052:3, 2055:15, 2059:15, 2089:13, 2089:16, 2102:6, 2119:3, 2120:3</p> <p>NIGHT [4] - 2024:5, 2024:8, 2028:12, 2041:17</p> <p>NINE [1] - 2053:9</p> <p>NO [2] - 2019:6, 2125:19</p> <p>NOBODY [1] - 2090:16</p> <p>NONE [3] - 2102:14, 2108:20, 2110:9</p> <p>NONE [2] - 2021:5, 2022:5</p> <p>NORM [1] - 2076:7</p> <p>NORMALLY [1] - 2107:24</p> <p>NORMAN [1] - 2076:1</p> <p>NORTH [1] - 2106:5</p> <p>NORTHERN [1] - 2112:15</p> <p>NOSSAMAN [2] - 2020:4, 2020:9</p> <p>NOTE [3] - 2069:11, 2069:25, 2075:3</p> <p>NOTES [2] - 2036:2, 2074:20</p> <p>NOTHING [3] - 2040:6, 2077:18, 2104:25</p> <p>NOTICE [3] - 2038:19, 2080:2, 2099:6</p> <p>NOTIFICATION [2] - 2080:14, 2080:21</p> <p>NOTIFY [1] - 2069:8</p> <p>NOTION [2] - 2028:23, 2100:10</p> <p>NOVEMBER [2] - 2087:17, 2096:22</p> <p>NOXIOUS [1] - 2086:24</p> <p>NUANCES [1] - 2086:20</p> <p>NUISANCE [36] - 2024:9, 2024:24, 2025:7, 2028:20, 2029:4, 2029:6, 2029:12, 2030:14, 2030:20, 2032:9, 2032:10, 2032:20, 2033:14, 2034:2, 2034:18, 2034:24, 2037:5, 2037:12, 2049:8, 2049:25, 2050:1, 2052:4, 2052:7, 2055:1, 2055:3, 2055:8,</p>
N				
<p>NAJM [3] - 2119:8, 2120:22, 2120:25</p> <p>NAME [6] - 2033:24, 2087:9, 2097:11, 2100:4, 2100:14, 2101:4</p> <p>NAMELY [3] - 2024:18, 2025:11, 2052:10</p> <p>NAMES [3] - 2042:20, 2089:3, 2100:19</p> <p>NATURE [7] - 2030:23, 2032:2, 2034:2, 2054:5, 2054:19, 2071:24</p> <p>NEAR [1] - 2103:17</p> <p>NEARBY [1] - 2086:12</p> <p>NECESSARILY [5] - 2027:20, 2030:18, 2034:21, 2057:13, 2117:19</p> <p>NECESSARY [5] - 2062:16, 2069:10, 2077:1, 2080:10, 2092:14</p> <p>NEED [18] - 2028:23, 2031:23, 2040:14, 2042:4, 2044:9,</p>				

2055:9, 2055:14, 2055:16, 2055:17, 2055:18, 2055:19, 2055:21, 2061:12, 2113:25, 2121:17 NUMBER ^[1] - 2022:3 NUMBER ^[12] - 2023:5, 2047:22, 2053:13, 2056:6, 2058:25, 2079:6, 2082:23, 2102:24, 2111:4, 2111:10, 2112:4, 2116:9 NUMBERS ^[1] - 2107:13 NUMERICALLY ^[1] - 2069:23 NUMEROUS ^[3] - 2036:15, 2076:10, 2116:3	OCCURS ^[1] - 2087:15 OCTOBER ^[1] - 2038:10 OF ^[11] - 2019:2, 2019:13, 2020:1, 2021:1, 2022:1, 2125:1, 2125:7, 2125:9, 2125:12, 2125:15 OFFENSIVE ^[2] - 2052:14, 2056:1 OFFICERS ^[6] - 2048:23, 2048:25, 2063:23, 2064:2, 2064:5, 2122:3 OFFICIAL ^[4] - 2019:24, 2125:1, 2125:5, 2125:19 OFFSITE ^[16] - 2030:5, 2092:22, 2093:2, 2093:9, 2099:23, 2102:15, 2104:25, 2105:1, 2106:6, 2106:15, 2111:6, 2111:21, 2112:17, 2113:4, 2115:2, 2116:21 OHIO ^[1] - 2122:12 OIL ^[1] - 2030:4 OLD ^[2] - 2073:15, 2077:14 OLD-FASHIONED ^[1] - 2073:15 OLDER ^[1] - 2075:12 OMISSION ^[2] - 2049:7, 2113:24 ONCE ^[4] - 2061:1, 2065:19, 2070:20, 2081:22 ONE ^[63] - 2024:20, 2024:25, 2028:9, 2032:17, 2036:3, 2040:15, 2045:3, 2046:1, 2047:14, 2049:9, 2049:11, 2051:2, 2052:9, 2053:16, 2054:12, 2055:5, 2055:23, 2056:22, 2058:16, 2058:20, 2059:18, 2063:7, 2063:22, 2063:23, 2064:2, 2064:5, 2065:22, 2069:12, 2071:4, 2074:13, 2075:3, 2075:4, 2081:2, 2081:5, 2082:5, 2085:7, 2089:2, 2090:7, 2092:23,	2093:14, 2095:11, 2096:20, 2102:4, 2103:16, 2104:4, 2104:20, 2107:1, 2107:20, 2108:23, 2109:20, 2110:10, 2112:19, 2112:20, 2113:6, 2114:14, 2114:15, 2115:3, 2116:22, 2116:25, 2118:5, 2118:10, 2120:4, 2122:3 ONE'S ^[1] - 2049:11 ONES ^[1] - 2111:18 ONESELF ^[2] - 2050:15, 2082:10 ONGOING ^[1] - 2101:23 ONSITE ^[13] - 2030:8, 2092:22, 2093:4, 2093:9, 2096:20, 2099:2, 2099:8, 2099:12, 2104:24, 2111:5, 2111:8, 2111:22 OOO ^[1] - 2023:3 OOPS ^[2] - 2098:25, 2107:20 OPEN ^[6] - 2024:7, 2046:4, 2066:6, 2069:17, 2124:8, 2124:11 OPENING ^[16] - 2070:18, 2071:14, 2072:24, 2073:4, 2073:5, 2074:15, 2090:14, 2090:17, 2107:3, 2107:9, 2110:16, 2111:20, 2113:18, 2120:15, 2123:4, 2123:16 OPERATE ^[1] - 2121:2 OPERATING ^[1] - 2099:16 OPERATIONS ^[6] - 2109:12, 2114:11, 2114:12, 2118:11, 2119:1, 2121:15 OPINION ^[9] - 2039:20, 2040:7, 2047:11, 2047:23, 2047:25, 2048:3, 2066:19, 2120:6 OPINIONS ^[3] - 2047:4, 2047:22, 2047:23 OPPORTUNITY ^[9] - 2027:23, 2039:4, 2044:1, 2045:20, 2046:17, 2055:12,	2070:17, 2071:20, 2095:23 OPPRESSION ^[7] - 2063:7, 2063:23, 2064:2, 2064:7, 2064:19, 2075:9, 2122:2 ORANGE ^[3] - 2027:21, 2029:21, 2032:17 ORANGE ^[1] - 2029:20 ORDER ^[5] - 2026:16, 2034:3, 2038:15, 2102:22, 2102:25 ORDERED ^[2] - 2067:18, 2081:23 ORDINANCES ^[1] - 2038:13 ORDINARY ^[3] - 2038:22, 2053:2, 2056:7 ORGANIC ^[5] - 2096:23, 2097:9, 2097:16, 2097:22 ORGANIZATION ^[1] - 2048:7 ORIGINAL ^[4] - 2060:24, 2061:3, 2061:4, 2083:15 OTHERWISE ^[5] - 2040:23, 2045:12, 2069:23, 2099:5, 2102:15 OUGHT ^[1] - 2106:8 OUTCOME ^[1] - 2121:22 OUTSIDE ^[8] - 2023:21, 2044:25, 2068:20, 2069:8, 2085:15, 2085:18, 2103:25, 2124:11 OUTSTANDING ^[2] - 2040:25, 2042:6 OUTWEIGHS ^[3] - 2053:9, 2053:12, 2056:9 OVERFLOWING ^[3] - 2083:12, 2083:14, 2085:3 OVERLOOKED ^[1] - 2040:12 OVERRULED ^[1] - 2081:16 OVERWHELMING ^[1] - 2123:12 OWN ^[25] - 2042:12, 2058:1, 2061:9, 2063:15, 2066:17, 2068:2, 2075:2,	2077:1, 2084:5, 2088:15, 2088:22, 2088:24, 2092:6, 2097:9, 2104:8, 2106:14, 2110:17, 2117:11, 2117:12, 2117:17, 2121:12, 2121:15 OWNED ^[7] - 2024:17, 2025:20, 2033:3, 2033:4, 2052:9, 2056:22, 2061:25 OWNER ^[2] - 2098:13, 2098:16 OWNERSHIP ^[4] - 2024:14, 2027:3, 2027:9, 2030:2 OWNS ^[7] - 2031:4, 2051:11, 2051:13, 2061:17, 2062:9, 2083:2, 2083:7
O			P	
O&M ^[2] - 2120:3, 2120:6 O'CLOCK ^[1] - 2124:4 OATH ^[3] - 2047:7, 2068:17, 2069:3 OBJECT ^[1] - 2025:23 OBJECTION ^[8] - 2024:12, 2025:8, 2025:21, 2025:24, 2043:11, 2081:10, 2081:15, 2081:16 OBJECTIONS ^[1] - 2043:21 OBJECTIVE ^[1] - 2054:14 OBLIGATION ^[1] - 2106:10 OBSERVATION ^[1] - 2027:16 OBSTRUCTION ^[2] - 2052:15, 2056:2 OBTAIN ^[1] - 2062:2 OBVIOUSLY ^[2] - 2078:9, 2116:15 OCCUPIED ^[6] - 2024:17, 2025:20, 2049:5, 2052:9, 2056:22, 2113:22 OCCUPY ^[3] - 2042:13, 2113:19, 2121:12 OCCUR ^[1] - 2091:22 OCCURRED ^[3] - 2064:8, 2108:20, 2115:3 OCCURRING ^[1] - 2090:12			PACKED ^[1] - 2085:8 PAGE ^[5] - 2035:15, 2108:18, 2112:13, 2115:22, 2116:7 PAGE ^[2] - 2021:3, 2125:11 PAGES ^[1] - 2019:8 PAID ^[2] - 2079:8, 2079:11 PALLETS ^[1] - 2076:11 PARAGRAPH ^[7] - 2042:17, 2042:22, 2043:2, 2043:4, 2059:15, 2059:16, 2102:6 PARE ^[1] - 2077:23 PARSED ^[1] - 2077:16 PART ^[6] - 2088:18, 2099:1, 2101:22, 2105:17, 2115:12, 2120:8 PARTICULAR ^[5] - 2032:2, 2037:16, 2054:1, 2054:16, 2060:12 PARTICULARLY ^[2] - 2037:11, 2107:19 PARTIES ^[9] - 2024:4, 2033:10, 2044:13, 2049:12, 2061:6, 2068:9, 2068:25, 2069:3, 2069:19 PARTS ^[1] - 2043:20 PARTY ^[12] - 2037:24, 2047:17, 2047:18,	

<p>2050:3, 2050:4, 2050:9, 2065:9, 2065:11, 2074:24, 2100:23, 2114:9 PARTY'S [1] - 2068:14 PAST [4] - 2080:8, 2097:15, 2097:21 PATIENCE [1] - 2115:4 PATRICK [1] - 2023:9 PATRICK [1] - 2020:5 PAY [3] - 2081:7, 2081:23, 2106:10 PCE [14] - 2042:20, 2057:1, 2082:15, 2088:5, 2089:4, 2089:7, 2097:23, 2106:1, 2106:24, 2107:19, 2114:6, 2116:5, 2116:6, 2116:12 PELOQUIN [11] - 2074:18, 2075:13, 2076:21, 2076:22, 2085:16, 2091:22, 2092:2, 2094:16, 2094:20, 2122:4, 2122:10 PEOPLE [7] - 2056:6, 2064:24, 2066:3, 2067:14, 2068:8, 2088:18, 2124:7 PER [12] - 2037:18, 2038:16, 2110:18, 2110:19, 2111:9, 2111:14, 2111:24, 2114:18, 2114:25, 2115:1 PERCENT [6] - 2059:13, 2059:22, 2116:12, 2116:13, 2116:14 PERCENTAGE [2] - 2058:7, 2059:25 PERCENTAGES [4] - 2058:22, 2059:12, 2059:20, 2059:22 PERCHLORATE [19] - 2042:20, 2057:1, 2073:22, 2073:23, 2074:8, 2078:21, 2078:24, 2080:9, 2080:13, 2081:1, 2082:2, 2094:9, 2094:11, 2103:20, 2104:16, 2106:21, 2106:22, 2116:4 PERCHLOROETHYL ENE [1] - 2089:4 PERFECT [1] -</p>	<p>2109:14 PERFORMED [1] - 2049:1 PERHAPS [2] - 2071:24, 2100:15 PERMANENT [2] - 2085:20, 2087:17 PERMISSION [1] - 2057:3 PERMIT [1] - 2045:18 PERMITTED [5] - 2052:12, 2052:23, 2055:24, 2071:2, 2100:5 PERPENDICULAR [2] - 2104:1, 2104:3 PERSON [37] - 2047:16, 2048:22, 2049:13, 2049:14, 2050:15, 2050:16, 2050:17, 2050:18, 2050:19, 2050:21, 2051:7, 2051:11, 2051:12, 2051:13, 2053:2, 2056:7, 2057:13, 2058:20, 2058:22, 2059:18, 2059:20, 2059:25, 2061:25, 2064:15, 2064:16, 2065:3, 2065:25, 2067:7, 2082:10, 2082:19, 2082:20, 2082:22, 2083:2, 2083:3, 2083:7, 2117:6 PERSON'S [4] - 2059:25, 2064:17, 2065:5 PERSONAL [2] - 2047:4, 2053:22 PERSPECTIVE [1] - 2113:8 PERSUADED [1] - 2050:6 PERSUADES [1] - 2066:19 PG [2] - 2022:3 PHASE [2] - 2115:15, 2115:20 PHONE [6] - 2044:4, 2044:5, 2044:6, 2067:8, 2079:22, 2079:23 PHOTO [3] - 2109:7, 2109:9 PHOTOS [1] - 2109:22 PHRASE [1] - 2115:5 PHRASED [1] - 2031:1 PHYLLIS [1] - 2110:18 PHYSICAL [1] -</p>	<p>2053:22 PICTURE [1] - 2078:5 PICTURES [1] - 2044:4 PIECE [1] - 2108:12 PIPE [1] - 2109:3 PIPELINE [1] - 2110:2 PIPING [1] - 2031:2 PIT [10] - 2089:5, 2089:8, 2089:12, 2089:15, 2089:20, 2089:25, 2090:1, 2090:5, 2090:23, 2099:10 PITS [2] - 2089:5, 2089:18 PLACE [4] - 2024:25, 2062:6, 2068:3, 2068:5 PLACED [1] - 2054:9 PLACES [3] - 2053:24, 2054:12, 2087:16 PLAINTIFF [25] - 2023:10, 2023:23, 2024:8, 2026:25, 2028:12, 2030:5, 2041:18, 2045:7, 2052:5, 2057:18, 2061:11, 2061:14, 2061:21, 2062:2, 2062:4, 2062:5, 2062:8, 2062:24, 2063:11, 2063:17, 2070:14, 2070:20, 2107:14, 2121:9 PLAINTIFF [2] - 2019:6, 2020:3 PLAINTIFF'S [4] - 2026:15, 2028:10, 2040:2, 2062:1 PLAINTIFFS [1] - 2041:6 PLANT [2] - 2089:8, 2090:5 PLAYING [1] - 2094:19 PLUME [4] - 2097:4, 2104:12, 2112:19, 2113:5 POINT [18] - 2024:4, 2028:23, 2036:1, 2036:13, 2036:23, 2043:24, 2045:22, 2046:11, 2065:17, 2072:23, 2073:11, 2092:17, 2103:13, 2109:5, 2123:16, 2123:23 POINT [2] - 2094:8 POINTED [2] - 2099:7,</p>	<p>2106:5 POINTS [2] - 2072:22, 2108:7 POLICIES [2] - 2092:6, 2097:19 POLICY [6] - 2034:6, 2045:11, 2065:6, 2088:19, 2088:21, 2088:22 POLISHED [1] - 2112:6 POLLUTER'S [1] - 2106:9 POLLUTION [7] - 2028:24, 2086:12, 2086:22, 2086:23, 2087:17, 2087:19 POMONA [3] - 2029:9, 2029:11, 2036:14 POOLS [1] - 2103:25 POPULATION [1] - 2108:1 PORTER [1] - 2038:7 PORTER-COLOGNE [1] - 2038:7 PORTION [1] - 2086:20 POSITION [1] - 2107:14 POSSESSION [1] - 2055:5 POSSESSORY [8] - 2028:13, 2030:19, 2032:14, 2032:15, 2033:12, 2034:10, 2061:13, 2062:2 POSSIBLE [4] - 2062:14, 2068:12, 2070:10, 2117:22 POTENTIAL [7] - 2084:9, 2086:20, 2095:13, 2115:6, 2115:13, 2116:7 POTENTIALLY [1] - 2038:22 POUNDS [4] - 2088:8, 2088:10, 2089:22, 2118:1 POWDER [2] - 2049:5, 2113:22 POWERPOINT [1] - 2045:25 PRACTICABILITY [1] - 2054:22 PRACTICAL [1] - 2039:25 PRACTICALLY [1] - 2087:16 PRACTICE [2] - 2057:15, 2057:17</p>	<p>PRACTICES [10] - 2057:10, 2057:12, 2088:13, 2090:9, 2090:25, 2091:5, 2092:5, 2097:15, 2097:21 PRECISE [2] - 2106:15, 2111:10 PRECISELY [2] - 2079:20, 2106:16 PREDECESSOR [1] - 2095:5 PREDICATED [1] - 2030:1 PREJUDGMENT [1] - 2044:14 PREJUDICES [1] - 2047:5 PRELIMINARY [1] - 2068:14 PREPARED [10] - 2070:3, 2074:20, 2076:1, 2102:6, 2104:8, 2109:6, 2109:21, 2113:2, 2116:9, 2116:17 PREPONDERANCE [6] - 2050:6, 2057:19, 2057:23, 2063:12, 2065:15, 2122:25 PRESENCE [5] - 2023:21, 2044:25, 2046:4, 2046:6, 2124:11 PRESENT [13] - 2038:15, 2038:24, 2046:21, 2065:11, 2070:17, 2070:19, 2070:21, 2071:13, 2074:23, 2075:1, 2097:15, 2097:21, 2118:7 PRESENT [1] - 2020:18 PRESENTED [13] - 2037:23, 2038:1, 2038:10, 2038:12, 2039:10, 2046:21, 2050:9, 2061:6, 2068:15, 2069:2, 2080:19, 2108:6, 2111:7 PRESENTING [1] - 2030:18 PRESENTLY [1] - 2077:2 PRESENTS [1] - 2074:24 PRESIDE [1] - 2065:23</p>
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<p>PRESIDENT [2] - 2076:20, 2078:16</p> <p>PRESIDENT [5] - 2074:21, 2076:21, 2077:7, 2095:3, 2122:12</p> <p>PRESIDING [4] - 2065:22, 2065:23, 2069:12, 2070:5</p> <p>PRESS [1] - 2067:14</p> <p>PRESUMPTION [2] - 2038:8, 2038:24</p> <p>PRESUPPOSES [1] - 2030:19</p> <p>PRETTY [9] - 2032:10, 2078:13, 2079:19, 2080:12, 2090:2, 2091:10, 2097:20, 2121:8</p> <p>PREVAIL [1] - 2034:3</p> <p>PREVENT [2] - 2050:15, 2082:10</p> <p>PREVENTING [1] - 2054:23</p> <p>PREVIOUSLY [3] - 2026:24, 2028:17, 2063:10</p> <p>PRICE [1] - 2121:3</p> <p>PRIMARY [4] - 2054:6, 2054:12, 2054:14, 2054:21</p> <p>PRINCIPAL [1] - 2049:14</p> <p>PRINCIPLE [1] - 2030:12</p> <p>PRINCIPLES [4] - 2047:14, 2048:17, 2082:11, 2120:2</p> <p>PRIVATE [6] - 2024:24, 2049:25, 2052:3, 2055:1, 2055:17, 2086:22</p> <p>PROBABILITY [1] - 2107:23</p> <p>PROBABLE [4] - 2051:21, 2064:16, 2065:12, 2086:2</p> <p>PROBLEM [10] - 2024:15, 2077:25, 2078:3, 2091:13, 2091:15, 2091:18, 2092:3, 2098:21, 2110:8, 2110:11</p> <p>PROCEDURAL [1] - 2044:3</p> <p>PROCEEDING [4] - 2026:12, 2080:1, 2081:18, 2081:19</p> <p>PROCEEDINGS [1] - 2125:10</p>	<p>PROCEEDINGS [3] - 2046:3, 2069:7, 2124:10</p> <p>PROCESS [5] - 2039:2, 2068:19, 2068:24, 2097:25, 2118:23</p> <p>PROCESSES [1] - 2086:12</p> <p>PRODUCE [4] - 2098:24, 2099:15, 2099:16, 2114:9</p> <p>PRODUCED [2] - 2114:10</p> <p>PRODUCTION [1] - 2080:11</p> <p>PROGRAM [3] - 2098:12, 2098:17, 2102:7</p> <p>PROGRAMS [1] - 2068:4</p> <p>PROJECT [2] - 2120:19</p> <p>PROJECTS [1] - 2119:20</p> <p>PROMISE [4] - 2099:24, 2107:6, 2107:10, 2108:2</p> <p>PROMISES [1] - 2123:4</p> <p>PROMULGATE [1] - 2091:20</p> <p>PROOF [18] - 2030:1, 2036:20, 2050:3, 2050:5, 2057:19, 2057:23, 2063:10, 2063:12, 2063:15, 2065:14, 2065:15, 2070:15, 2080:24, 2114:12, 2122:16, 2122:18</p> <p>PROPENSITY [1] - 2087:1</p> <p>PROPER [3] - 2039:10, 2118:4</p> <p>PROPERLY [2] - 2037:22, 2039:9</p> <p>PROPERTY [53] - 2024:18, 2025:13, 2025:17, 2025:20, 2025:25, 2026:15, 2027:3, 2028:3, 2028:10, 2031:9, 2033:9, 2033:10, 2036:4, 2036:7, 2051:11, 2051:12, 2051:13, 2051:19, 2052:10, 2052:15, 2052:17, 2053:18, 2056:2, 2056:4,</p>	<p>2056:20, 2056:23, 2057:2, 2060:18, 2060:24, 2060:25, 2061:3, 2061:4, 2061:13, 2061:14, 2061:21, 2062:10, 2072:7, 2073:20, 2077:24, 2078:2, 2078:4, 2078:10, 2083:2, 2083:4, 2083:7, 2083:21, 2084:7, 2086:23, 2103:3, 2104:21, 2121:13, 2122:7, 2122:9</p> <p>PROPOSAL [1] - 2096:6</p> <p>PROPOSED [1] - 2041:5</p> <p>PROPRIETY [1] - 2026:4</p> <p>PROTECT [2] - 2055:14, 2068:14</p> <p>PROTECTING [1] - 2051:24</p> <p>PROTECTS [1] - 2054:17</p> <p>PROVE [28] - 2024:20, 2028:13, 2034:2, 2036:19, 2036:22, 2051:1, 2052:5, 2052:8, 2055:4, 2055:22, 2056:20, 2058:3, 2058:15, 2060:14, 2060:19, 2061:8, 2061:12, 2062:6, 2063:7, 2063:11, 2063:20, 2073:6, 2107:6, 2117:10, 2118:16, 2122:18, 2122:19</p> <p>PROVED [3] - 2060:7, 2063:6, 2123:6</p> <p>PROVEN [1] - 2073:9</p> <p>PROVES [1] - 2058:6</p> <p>PROVIDE [1] - 2099:13</p> <p>PROVIDE [15] - 2024:5, 2038:5, 2043:23, 2047:13, 2047:18, 2059:5, 2060:2, 2060:15, 2061:19, 2065:17, 2080:22, 2081:1, 2100:14, 2114:21, 2118:17</p> <p>PROVIDED [3] - 2024:8, 2047:18, 2047:19</p> <p>PROVIDES [1] -</p>	<p>2030:14</p> <p>PROVIDING [1] - 2046:11</p> <p>PROVING [2] - 2055:2, 2065:9</p> <p>PUBLIC [14] - 2045:11, 2049:25, 2053:10, 2053:12, 2054:10, 2054:17, 2055:15, 2055:18, 2055:19, 2056:14, 2078:7, 2087:6, 2121:17</p> <p>PUBLICATION [1] - 2086:19</p> <p>PUDDING [1] - 2114:13</p> <p>PUMP [2] - 2114:17, 2115:1</p> <p>PUMPING [2] - 2031:2, 2114:23</p> <p>PUNITIVE [16] - 2045:4, 2045:5, 2045:8, 2045:10, 2045:14, 2045:18, 2045:22, 2062:25, 2063:3, 2063:14, 2063:19, 2121:23, 2121:25, 2122:20, 2122:24</p> <p>PURCHASE [1] - 2061:8</p> <p>PURCHASED [3] - 2049:6, 2088:6</p> <p>PURE [1] - 2123:18</p> <p>PURPOSE [5] - 2030:11, 2054:13, 2054:14, 2054:16, 2083:15</p> <p>PURSUANT [1] - 2125:8</p> <p>PUT [12] - 2054:25, 2055:13, 2085:10, 2089:12, 2093:1, 2093:12, 2094:24, 2100:20, 2103:8, 2106:14, 2114:16, 2123:15</p> <p>PUTS [1] - 2108:18</p> <p>PUTTING [5] - 2031:6, 2092:10, 2092:15, 2098:10, 2099:3</p> <p>PVC [1] - 2117:14</p>	<p>QUALITY [2] - 2097:7, 2097:24</p> <p>QUANTITY [2] - 2097:12, 2099:18</p> <p>QUARTER [1] - 2113:3</p> <p>QUESTIONABLE [1] - 2027:4</p> <p>QUESTIONS [9] - 2024:7, 2058:25, 2059:4, 2072:16, 2090:14, 2099:25, 2103:16, 2108:23, 2121:17</p> <p>QUITE [5] - 2032:1, 2079:4, 2079:22, 2086:18</p> <p>QUOTE [4] - 2080:8, 2083:2, 2099:13, 2111:23</p>
R				
<p>RAINS [1] - 2111:11</p> <p>RAISE [2] - 2038:24, 2045:2</p> <p>RAISED [4] - 2026:3, 2026:16, 2033:13, 2037:13</p> <p>RAN [1] - 2076:23</p> <p>RATE [2] - 2102:9, 2111:21</p> <p>RATES [1] - 2111:1</p> <p>RATHER [5] - 2074:25, 2100:23, 2107:4, 2107:15, 2110:10</p> <p>RAVEN [1] - 2020:5</p> <p>RCRA [2] - 2090:16, 2090:21</p> <p>REACH [5] - 2034:20, 2066:8, 2066:15, 2066:22, 2087:14</p> <p>REACHED [2] - 2069:24, 2070:4</p> <p>READ [19] - 2047:8, 2059:14, 2059:15, 2066:1, 2067:20, 2068:10, 2074:24, 2077:4, 2077:8, 2084:8, 2084:12, 2086:19, 2087:18, 2087:23, 2088:20, 2089:10, 2117:1, 2118:6</p> <p>READING [3] - 2035:25, 2046:14, 2115:22</p> <p>READS [1] - 2085:17</p> <p>READY [2] - 2070:8,</p>				
Q				
<p>Q2 [1] - 2081:4</p> <p>QUALITY [5] - 2093:8, 2093:16, 2098:18, 2102:7, 2102:16</p>				

2120:16 READY-MADE [1] - 2120:16 REAL [4] - 2033:24, 2036:4, 2036:7, 2039:1 REALITY [1] - 2034:13 REALIZED [1] - 2074:1 REALLY [14] - 2027:14, 2030:7, 2033:23, 2037:15, 2038:1, 2039:1, 2094:14, 2096:17, 2097:3, 2097:5, 2104:14, 2105:9, 2118:13, 2122:21 REALTIME [1] - 2125:5 REASON [2] - 2045:6, 2093:5 REASONABLE [33] - 2028:1, 2050:12, 2050:14, 2051:7, 2051:12, 2051:14, 2051:17, 2055:12, 2055:13, 2057:13, 2057:17, 2060:15, 2060:19, 2060:21, 2061:5, 2061:8, 2064:24, 2065:16, 2071:1, 2077:4, 2082:9, 2083:3, 2083:7, 2084:4, 2096:2, 2100:9, 2107:18, 2114:4, 2117:6, 2118:17, 2119:6, 2119:25 REASONABLY [13] - 2038:4, 2050:17, 2050:19, 2050:21, 2051:13, 2051:16, 2053:2, 2056:8, 2057:12, 2060:9, 2082:20, 2082:22, 2083:4 REASONED [1] - 2062:20 REASONS [3] - 2025:23, 2047:22, 2048:3 REBUTTAL [1] - 2070:21 RECEIVE [3] - 2023:22, 2046:12, 2116:25 RECEIVED [4] - 2062:15, 2066:24, 2080:13, 2100:23 RECEIVING [2] -	2101:2, 2101:3 RECENT [1] - 2096:21 RECENTLY [3] - 2038:6, 2038:10, 2038:12 RECESS [4] - 2044:19, 2044:22, 2124:12, 2124:16 RECHARGE [1] - 2111:12 RECKLESS [6] - 2052:21, 2083:20, 2090:9, 2090:10, 2092:5 RECKLESSLY [1] - 2056:25 RECOGNIZE [1] - 2026:10 RECOMMENDATION [1] - 2106:7 RECOMMENDED [1] - 2095:18 RECORD [9] - 2037:8, 2042:3, 2044:23, 2046:5, 2087:19, 2099:11, 2100:7, 2113:9 RECORDS [7] - 2088:6, 2097:14, 2099:8, 2099:15, 2099:16, 2099:18 RECOVER [5] - 2028:12, 2060:18, 2061:7, 2061:11, 2062:4 REDUCED [1] - 2058:7 REDUCTION [1] - 2058:9 REFER [3] - 2046:16, 2048:18, 2060:5 REFERENCE [7] - 2025:17, 2062:24, 2068:1, 2086:1, 2089:3, 2104:5, 2104:6 REFERENCES [2] - 2089:6, 2113:18 REFERRED [1] - 2084:23 REFERRING [3] - 2029:24, 2048:19, 2059:10 REFERS [3] - 2098:22, 2101:21, 2102:6 REFLECT [1] - 2045:21 REFLECTING [1] - 2103:25	REFURBISH [1] - 2079:10 REGARD [12] - 2030:20, 2037:12, 2037:14, 2037:18, 2039:16, 2041:9, 2041:15, 2049:19, 2057:18, 2062:17, 2063:10, 2063:14 REGARDING [4] - 2030:25, 2047:11, 2050:11, 2101:14 REGARDLESS [1] - 2050:9 REGIONAL [2] - 2097:7, 2097:24 REGULATIONS [1] - 2125:12 REGULATORS [6] - 2084:25, 2085:25, 2087:5, 2094:17, 2094:21, 2101:23 REIMBURSE [1] - 2080:5 REIMBURSE [1] - 2080:8 REJECT [1] - 2048:1 REJECTED [1] - 2107:8 RELATES [1] - 2025:25 RELATING [1] - 2038:8 RELATIONSHIP [2] - 2049:12, 2060:22 RELEASED [1] - 2080:10 RELEASES [1] - 2075:16 RELIANCE [1] - 2112:8 RELIED [4] - 2029:3, 2029:20, 2029:25, 2120:1 RELY [2] - 2075:17, 2116:22 RELYING [3] - 2029:9, 2030:12, 2033:18 REMAIN [2] - 2024:7, 2046:5 REMAINED [1] - 2026:8 REMIATED [1] - 2031:14 REMEDIATION [2] - 2103:6, 2117:4 REMEDIES [1] - 2034:1 REMEMBER [6] - 2069:3, 2069:22,	2079:23, 2100:13, 2110:4, 2124:6 REMEMBERED [1] - 2075:13 REMIND [3] - 2066:25, 2067:3, 2070:22 REMINDED [1] - 2086:5 REMISS [1] - 2101:24 REMOTE [2] - 2051:9, 2117:7 REMOVED [2] - 2088:9, 2088:10 REPAIR [2] - 2051:15, 2060:22 REPAIRING [2] - 2060:19, 2060:20 REPEAT [3] - 2026:2, 2026:6, 2035:20 REPEATEDLY [1] - 2118:11 REPETITIVE [2] - 2071:24, 2101:15 REPLACE [1] - 2051:15 REPLACEMENT [6] - 2061:9, 2081:24, 2118:9, 2118:13, 2118:22, 2118:25 REPORT [14] - 2067:19, 2068:11, 2070:24, 2101:19, 2104:8, 2105:16, 2109:6, 2109:16, 2109:21, 2111:7, 2112:23, 2115:14, 2115:20, 2119:19 REPORTED [1] - 2125:10 REPORTER [4] - 2019:24, 2125:1, 2125:6, 2125:19 REPORTER'S [1] - 2019:13 REPORTS [2] - 2067:23, 2108:14 REPRESENTATIVE [3] - 2048:9, 2048:11, 2048:15 REPRESENTED [1] - 2105:4 REPRODUCTIVE [1] - 2086:3 REQUEST [5] - 2024:9, 2039:23, 2045:21, 2080:7, 2080:12 REQUESTED [2] - 2040:9, 2097:10 REQUESTING [1] -	2026:15 REQUIRE [2] - 2027:25, 2065:15 REQUIRED [2] - 2080:4, 2102:5 REQUIREMENT [1] - 2094:16 REQUIREMENTS [1] - 2120:13 REQUIRES [2] - 2038:19, 2098:13 RESEARCH [3] - 2067:24, 2068:7, 2068:20 RESIDENTIAL [1] - 2054:7 RESOLVED [1] - 2043:19 RESPECT [4] - 2026:11, 2035:2, 2037:11, 2050:2 RESPECTFULLY [1] - 2032:23 RESPOND [1] - 2067:17 RESPONDENT [1] - 2098:23 RESPONDENT'S [1] - 2099:1 RESPONSE [4] - 2041:15, 2080:14, 2080:22, 2119:2 RESPONSES [1] - 2059:6 RESPONSIBILITY [31] - 2039:17, 2049:10, 2058:8, 2058:11, 2058:21, 2058:22, 2059:19, 2059:20, 2059:25, 2073:12, 2073:16, 2073:24, 2074:2, 2074:3, 2074:5, 2074:8, 2074:17, 2076:23, 2078:17, 2078:19, 2079:2, 2079:5, 2080:7, 2080:25, 2082:4, 2097:2, 2113:20, 2114:22, 2118:4, 2121:3, 2123:20 RESPONSIBLE [9] - 2048:24, 2049:16, 2073:19, 2073:21, 2073:22, 2077:22, 2083:24, 2123:19, 2124:1 REST [2] - 2035:4, 2073:24 RESTATE [1] -
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<p>2045:16 RESTED [2] - 2024:5, 2046:9 RESTORATION [4] - 2028:13, 2033:21, 2035:5, 2061:11 RESTORE [5] - 2033:23, 2060:24, 2061:2, 2061:4, 2080:11 RESTRICTIONS [1] - 2069:6 RESULT [1] - 2052:23 RESULTED [2] - 2049:8, 2113:24 RESULTS [3] - 2095:15, 2096:21, 2107:12 RETIRE [2] - 2072:15, 2082:25 RETURN [1] - 2070:8 RETURNED [1] - 2062:15 RETURNING [1] - 2023:11 REVEALED [1] - 2046:20 REVIEW [2] - 2098:25, 2108:13 REVIEWED [2] - 2098:22, 2109:20 REVISED [1] - 2099:1 RICHARD [12] - 2023:9, 2026:21, 2027:24, 2030:16, 2037:3, 2037:6, 2037:18, 2040:3, 2041:20, 2071:13, 2072:18, 2123:6 RICHARD [26] - 2020:5, 2023:9, 2024:2, 2028:8, 2028:16, 2029:8, 2029:13, 2029:18, 2030:9, 2030:24, 2031:10, 2031:13, 2031:18, 2035:14, 2035:22, 2037:7, 2040:4, 2040:15, 2040:18, 2040:24, 2041:8, 2041:21, 2071:15, 2081:12, 2081:17, 2094:20 RICHARD'S [1] - 2027:15 RIGHTS [14] - 2026:5, 2028:21, 2029:5, 2030:1, 2032:2, 2032:12, 2032:18, 2036:18, 2036:21,</p>	<p>2045:8, 2064:13, 2064:21 RISE [1] - 2087:13 RISK [4] - 2051:23, 2051:24, 2052:2, 2055:9 RISKS [2] - 2085:5, 2086:8 RIVERS [1] - 2086:23 ROLL [1] - 2038:6 RON [1] - 2020:20 ROOM [6] - 2046:16, 2065:20, 2066:5, 2067:9, 2083:1, 2091:23 RPR [1] - 2019:23 RULE [4] - 2048:5, 2048:8, 2048:11, 2048:14 RULE [1] - 2092:10 RULED [4] - 2026:24, 2045:4, 2079:3, 2115:14 RULES [9] - 2032:10, 2032:16, 2068:13, 2069:4, 2069:5, 2081:15, 2091:21, 2092:4, 2092:7 RULING [3] - 2045:5, 2045:17, 2074:6 RUN [1] - 2096:3 RUN-ON [1] - 2096:3 RUNOFF [1] - 2084:15</p>	<p>S</p> <p>S-A-B-I-C [1] - 2027:22 SABIC [1] - 2030:21 SABIC [10] - 2027:21, 2029:1, 2030:21, 2031:16, 2031:21, 2032:1, 2033:7, 2035:8, 2035:15, 2037:13 SAFE [5] - 2051:13, 2083:4, 2085:18, 2088:19, 2123:18 SAFETY [4] - 2064:14, 2074:19, 2086:5, 2091:19 SALESMAN [1] - 2122:11 SAMPLE [1] - 2110:1 SAMPLES [1] - 2028:24 SAMPLING [1] - 2096:21 SAN [2] - 2020:11, 2020:16</p>	<p>SANDY [1] - 2105:12 SANTA [1] - 2019:5 SANTA [4] - 2023:6, 2044:24, 2049:24, 2050:24 SARCASTIC [1] - 2078:14 SAT [5] - 2073:10, 2081:20, 2091:23, 2108:5, 2122:5 SAUGUS [10] - 2058:13, 2101:9, 2114:23, 2114:25, 2116:11, 2116:12, 2116:13, 2116:15, 2117:16, 2119:15 SAVE [2] - 2077:19, 2122:14 SAW [10] - 2083:16, 2085:12, 2092:2, 2097:19, 2098:3, 2098:4, 2098:5, 2112:24, 2122:4, 2122:8 SCALE [1] - 2123:7 SCAN [1] - 2044:5 SCANNER [1] - 2044:5 SCHEDULE [1] - 2101:20 SCOPE [4] - 2049:1, 2049:17, 2095:22, 2097:5 SCOPING [4] - 2115:12, 2115:15, 2115:20, 2116:19 SCOTT [6] - 2020:9, 2025:4, 2042:9, 2043:1, 2043:8, 2044:12 SCOTT [4] - 2020:19, 2023:10, 2042:8, 2044:9 SCV [64] - 2024:17, 2025:20, 2051:1, 2051:3, 2051:5, 2052:6, 2052:8, 2052:9, 2053:1, 2053:4, 2053:6, 2053:8, 2053:12, 2053:15, 2053:17, 2053:22, 2054:9, 2054:24, 2055:3, 2055:11, 2055:14, 2055:20, 2055:22, 2056:11, 2056:13, 2056:17, 2056:19, 2056:20, 2056:22, 2057:1, 2057:3, 2057:5, 2057:7,</p>	<p>2057:11, 2057:19, 2058:1, 2058:4, 2058:6, 2058:8, 2058:14, 2058:18, 2058:20, 2059:18, 2059:23, 2060:7, 2060:9, 2060:14, 2060:19, 2061:2, 2061:4, 2061:8, 2062:12, 2062:14, 2062:24, 2063:1, 2063:5, 2063:7, 2063:20, 2064:20, 2065:2, 2070:14, 2118:15 SCVWA [1] - 2080:8 SE [2] - 2037:18, 2038:16 SEARCH [1] - 2068:5 SEARCHING [1] - 2067:25 SECOND [2] - 2035:24, 2071:7 SECTION [2] - 2042:14, 2098:13 SECTION [1] - 2125:8 SECTIONS [1] - 2024:6 SEE [25] - 2025:6, 2028:17, 2038:21, 2039:11, 2040:11, 2043:10, 2066:1, 2071:16, 2073:3, 2086:1, 2089:12, 2089:16, 2093:3, 2104:23, 2108:9, 2108:13, 2108:19, 2108:20, 2112:25, 2113:5, 2113:7, 2113:9, 2114:8, 2117:12 SEEM [2] - 2024:3, 2105:25 SEIZE [1] - 2115:16 SELECTION [1] - 2062:23 SELF [1] - 2121:9 SELF- EXPLANATORY [1] - 2121:9 SELL [3] - 2061:16, 2077:24, 2078:2 SEMANTICS [1] - 2115:17 SEND [6] - 2042:14, 2069:11, 2069:18, 2096:8, 2096:12, 2097:16 SENSE [5] - 2032:8, 2033:24, 2041:22,</p>	<p>2092:14, 2120:22 SENSES [2] - 2052:14, 2056:1 SENT [5] - 2023:18, 2028:12, 2041:17, 2043:8, 2080:14 SENTENCE [1] - 2096:3 SEPARATE [4] - 2055:18, 2059:23, 2061:14, 2100:20 SEPARATELY [1] - 2061:16 SERIES [1] - 2118:20 SERIOUS [5] - 2073:1, 2078:9, 2087:20, 2091:15, 2091:18 SERIOUSLY [1] - 2028:7 SERIOUSNESS [6] - 2051:21, 2053:9, 2053:11, 2053:14, 2054:2, 2056:9 SERVE [2] - 2065:24, 2066:4 SERVES [1] - 2072:5 SERVICE [1] - 2067:17 SERVICES [1] - 2096:24 SET [6] - 2061:6, 2080:3, 2084:16, 2089:16, 2099:10, 2108:6 SETS [2] - 2082:7, 2095:8 SETTLE [1] - 2079:1 SETTLED [3] - 2040:23, 2041:10, 2041:12 SETTLEMENT [3] - 2079:7, 2079:15, 2080:2 SETTLING [1] - 2041:3 SEVEN [3] - 2053:6, 2056:16, 2080:14 SHALL [1] - 2066:8 SHALLOW [2] - 2112:21, 2116:23 SHARE [2] - 2079:20, 2120:6 SHOCKED [1] - 2075:21 SHOP [3] - 2085:15, 2085:18, 2089:4 SHORT [1] - 2107:7 SHORTLY [2] - 2023:12, 2062:19 SHOULDERS [1] -</p>
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<p>2063:17</p> <p>SHOW [16] - 2072:25, 2073:2, 2073:9, 2090:17, 2095:1, 2096:21, 2099:2, 2099:22, 2104:24, 2107:9, 2108:2, 2110:22, 2112:20, 2113:4, 2113:9, 2113:18</p> <p>SHOWED [2] - 2076:25, 2123:10</p> <p>SHOWING [2] - 2099:17, 2100:11</p> <p>SHOWN [3] - 2096:22, 2099:24, 2122:9</p> <p>SHOWS [4] - 2030:7, 2071:21, 2092:20, 2105:6</p> <p>SHUT [2] - 2079:14, 2118:8</p> <p>SIC [12] - 2039:23, 2040:1, 2040:10, 2058:13, 2058:16, 2058:17, 2117:9, 2117:10, 2117:14, 2117:19, 2117:21, 2117:24</p> <p>SIC [1] - 2104:11</p> <p>SIDE [3] - 2038:20, 2040:2, 2110:24</p> <p>SIDES [1] - 2046:9</p> <p>SIFT [2] - 2077:1, 2115:8</p> <p>SIFTING [1] - 2077:6</p> <p>SIGN [1] - 2070:7</p> <p>SIGNATURE [2] - 2100:3, 2100:7</p> <p>SIGNATURES [4] - 2100:18, 2100:22, 2101:1</p> <p>SIGNED [2] - 2069:12, 2069:15</p> <p>SIGNIFICANCE [1] - 2039:25</p> <p>SIGNS [1] - 2102:23</p> <p>SIMILAR [4] - 2030:20, 2076:6, 2081:8, 2108:17</p> <p>SIMILARITIES [1] - 2116:3</p> <p>SIMPLE [1] - 2111:25</p> <p>SIMPLY [3] - 2066:20, 2066:22, 2100:3</p> <p>SIMPSON [5] - 2081:18, 2120:4, 2120:11, 2120:14, 2120:16</p> <p>SINGLE [1] - 2043:2</p> <p>SITE [29] - 2030:8,</p>	<p>2049:5, 2075:22, 2076:12, 2080:10, 2085:7, 2093:18, 2094:1, 2101:24, 2103:18, 2104:15, 2104:20, 2105:3, 2105:7, 2105:14, 2106:1, 2106:3, 2106:6, 2106:15, 2110:20, 2113:13, 2113:19, 2113:23, 2114:19, 2116:11, 2116:16, 2117:3, 2118:1, 2120:19</p> <p>SITES [3] - 2077:21, 2089:2, 2089:7</p> <p>SITTING [1] - 2109:1</p> <p>SITUATION [6] - 2031:12, 2050:18, 2050:20, 2050:22, 2057:14, 2082:21</p> <p>SIX [3] - 2053:4, 2056:13, 2119:22</p> <p>SLABS [1] - 2120:13</p> <p>SLIGHT [1] - 2043:1</p> <p>SLIPPED [1] - 2075:6</p> <p>SLOW [1] - 2087:21</p> <p>SLOWER [2] - 2111:18, 2111:19</p> <p>SLOWLY [1] - 2087:15</p> <p>SLUDGE [5] - 2085:12, 2085:13, 2089:24, 2099:9, 2114:11</p> <p>SMALL [1] - 2087:4</p> <p>SNAPCHAT [1] - 2067:11</p> <p>SOCIAL [4] - 2053:25, 2054:15, 2056:10, 2067:12</p> <p>SOCIETY [2] - 2053:24, 2054:12</p> <p>SOIL [7] - 2027:19, 2028:24, 2089:20, 2089:22, 2106:19, 2106:21, 2110:1</p> <p>SOLD [1] - 2103:3</p> <p>SOLELY [1] - 2047:6</p> <p>SOLVENT [1] - 2085:19</p> <p>SOLVENTS [11] - 2082:16, 2083:12, 2083:23, 2085:6, 2085:12, 2085:22, 2087:2, 2089:4, 2090:6, 2090:8</p> <p>SOMEONE [9] - 2066:3, 2077:24, 2078:10, 2088:11, 2091:8, 2092:9,</p>	<p>2101:10, 2120:18, 2123:20</p> <p>SOMETIMES [4] - 2066:3, 2074:12, 2115:15, 2123:20</p> <p>SOMEWHERE [2] - 2033:11, 2087:25</p> <p>SOON [3] - 2040:13, 2068:12, 2093:1</p> <p>SOONER [1] - 2103:8</p> <p>SORRY [6] - 2026:21, 2037:12, 2037:19, 2039:20, 2042:19, 2076:18</p> <p>SORSHER [7] - 2075:12, 2076:3, 2078:16, 2095:2, 2096:12, 2101:21, 2122:9</p> <p>SOUNDS [2] - 2091:11, 2091:13</p> <p>SOURCE [9] - 2107:18, 2115:14, 2115:21, 2116:1, 2116:5, 2116:6, 2118:2</p> <p>SOURCES [6] - 2036:3, 2062:14, 2107:4, 2115:13, 2116:3, 2119:1</p> <p>SOUTH [1] - 2031:25</p> <p>SOUTH [1] - 2020:6</p> <p>SOUTHERN [3] - 2086:14, 2087:3, 2088:3</p> <p>SPEAKING [1] - 2038:17</p> <p>SPEARS [1] - 2078:7</p> <p>SPECIAL [7] - 2023:19, 2042:7, 2042:11, 2059:3, 2082:12, 2086:13, 2124:13</p> <p>SPECIALISTS [1] - 2087:5</p> <p>SPECIFIC [4] - 2038:5, 2038:6, 2089:6, 2099:17</p> <p>SPECIFIED [1] - 2048:7</p> <p>SPECIFY [1] - 2100:4</p> <p>SPECULATE [3] - 2060:16, 2062:13, 2118:18</p> <p>SPEED [1] - 2094:4</p> <p>SPEND [1] - 2114:15</p> <p>SPIKES [1] - 2108:3</p> <p>SPOKESPERSON [1] - 2065:24</p> <p>SPOTS [1] - 2042:11</p>	<p>SPREAD [2] - 2092:16, 2112:19</p> <p>SPREADING [1] - 2092:12</p> <p>SPREADS [1] - 2094:25</p> <p>SQUARELY [2] - 2028:21, 2036:8</p> <p>STAGE [1] - 2095:8</p> <p>STAND [4] - 2029:18, 2111:13, 2114:2, 2115:19</p> <p>STANDARD [5] - 2050:11, 2065:14, 2119:13, 2120:2, 2122:19</p> <p>STANDING [5] - 2030:14, 2030:17, 2030:22, 2036:16, 2036:19</p> <p>STANDS [4] - 2069:23, 2087:7, 2087:11, 2092:19</p> <p>STANIN [4] - 2104:7, 2110:18, 2111:23, 2112:16</p> <p>STANLEY [1] - 2019:3</p> <p>STARRH [18] - 2029:20, 2029:24, 2030:3, 2030:9, 2030:10, 2030:24, 2031:11, 2032:13, 2032:14, 2033:5, 2033:7, 2035:8</p> <p>START [10] - 2024:7, 2050:10, 2072:21, 2073:13, 2092:11, 2092:15, 2098:9, 2112:11, 2114:19, 2120:9</p> <p>STARTED [5] - 2034:25, 2038:6, 2077:5, 2082:17, 2103:5</p> <p>STARTING [2] - 2049:22, 2059:16</p> <p>STATE [1] - 2096:23</p> <p>STATE [9] - 2023:8, 2029:15, 2029:16, 2061:3, 2061:25, 2074:20, 2078:16, 2086:23, 2090:14</p> <p>STATEMENT [10] - 2028:19, 2073:5, 2074:16, 2090:15, 2107:3, 2110:16, 2111:20, 2113:18, 2123:4, 2123:17</p> <p>STATES [1] - 2086:17</p> <p>STATES [4] - 2019:1,</p>	<p>2125:6, 2125:8, 2125:13</p> <p>STATING [1] - 2025:25</p> <p>STATISTICIAN [1] - 2107:22</p> <p>STATISTICIANS [1] - 2107:24</p> <p>STATUTE [3] - 2038:7, 2038:9, 2039:14</p> <p>STATUTES [4] - 2038:4, 2038:6, 2038:17, 2039:7</p> <p>STATUTORY [1] - 2038:5</p> <p>STAY [1] - 2112:7</p> <p>STEEL [1] - 2110:5</p> <p>STEFFEY [3] - 2108:11, 2109:1, 2109:17</p> <p>STENOGRAPHICAL [1] - 2125:10</p> <p>STEP [1] - 2092:15</p> <p>STEPPED [2] - 2023:11</p> <p>STEPS [4] - 2055:13, 2080:4, 2102:24, 2103:1</p> <p>STICKING [1] - 2027:18</p> <p>STILL [11] - 2025:23, 2027:9, 2031:7, 2036:22, 2038:12, 2040:19, 2080:15, 2080:25, 2081:1, 2092:3, 2119:16</p> <p>STONE [2] - 2020:19, 2080:6</p> <p>STOOD [1] - 2073:11</p> <p>STOP [3] - 2091:2, 2097:3, 2105:3</p> <p>STOPPED [2] - 2108:17, 2108:21</p> <p>STORAGE [1] - 2099:17</p> <p>STORED [3] - 2088:7, 2097:12, 2099:8</p> <p>STRAIGHT [2] - 2084:18, 2085:4</p> <p>STREAMS [1] - 2086:23</p> <p>STREET [3] - 2020:6, 2020:10, 2020:15</p> <p>STREET [1] - 2019:24</p> <p>STRIKE [2] - 2050:13, 2064:3</p> <p>STRIVE [1] - 2066:8</p> <p>STRONGER [2] - 2047:19, 2074:25</p> <p>STUDIES [1] - 2085:2</p>
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STUDY [4] - 2081:24, 2086:11, 2086:20, 2086:22 STUFF [3] - 2076:18, 2097:13, 2102:14 SUBJECT [3] - 2043:21, 2079:14, 2124:7 SUBJECTED [1] - 2064:20 SUBMIT [5] - 2039:15, 2043:6, 2079:4, 2096:3, 2116:8 SUBMITTAL [1] - 2075:22 SUBMITTED [2] - 2042:12, 2091:1 SUBSTANCES [1] - 2075:16 SUBSTANTIAL [18] - 2051:5, 2051:6, 2053:7, 2056:5, 2056:16, 2057:6, 2058:5, 2058:18, 2058:20, 2059:18, 2065:4, 2102:24, 2117:2, 2117:5, 2117:10, 2117:24, 2121:11 SUBSTANTIALLY [2] - 2038:2, 2052:25 SUBSTANTIVE [3] - 2043:14, 2043:17, 2043:20 SUBSURFACE [5] - 2027:13, 2030:1, 2030:5, 2061:18, 2062:10 SUBTERRANEAN [1] - 2087:20 SUCCEED [2] - 2058:2, 2058:14 SUCCESSOR [3] - 2049:3, 2049:4, 2113:22 SUED [5] - 2074:5, 2074:9, 2078:23, 2079:3, 2104:10 SUFFERED [5] - 2052:6, 2053:15, 2055:20, 2056:13, 2056:14 SUFFICE [1] - 2079:21 SUFFICIENT [4] - 2029:6, 2029:7, 2030:14, 2099:14 SUGGEST [2] - 2111:17, 2115:24 SUGGESTED [1] - 2079:4	SUGGESTING [1] - 2031:22 SUGGESTION [1] - 2101:8 SUGGESTS [2] - 2033:19, 2099:4 SUITABILITY [3] - 2054:4, 2054:18, 2054:20 SUITE [1] - 2019:24 SUITE [1] - 2020:16 SUM [1] - 2070:23 SUMPS [1] - 2084:22 SUPERIOR [1] - 2034:9 SUPPLY [3] - 2061:18, 2086:24, 2097:10 SUPPORT [1] - 2038:4 SUPPORTED [1] - 2028:25 SUPPORTING [1] - 2081:11 SUPPORTS [2] - 2038:8, 2040:5 SUPPOSED [2] - 2088:17, 2100:11 SURFACE [8] - 2057:8, 2061:17, 2062:10, 2085:23, 2087:20, 2098:13, 2098:14, 2098:16 SURPRISED [4] - 2073:10, 2075:21, 2108:25, 2109:5 SURROUNDING [3] - 2027:19, 2033:5, 2037:25 SURVEY [1] - 2086:17 SYMPATHY [1] - 2047:5 SYSTEM [6] - 2039:2, 2096:6, 2096:17, 2107:19, 2109:24, 2114:24 SYSTEMS [4] - 2119:9, 2119:11, 2119:15, 2121:1	2109:25, 2110:3, 2110:6 TASK [1] - 2066:7 TCE [22] - 2042:20, 2057:1, 2086:1, 2088:5, 2089:24, 2089:25, 2104:24, 2105:7, 2105:25, 2106:19, 2106:24, 2107:19, 2113:5, 2114:6, 2116:1, 2116:4, 2116:5, 2116:14, 2117:18, 2117:21 TEACHES [1] - 2119:9 TEAR [1] - 2098:15 TECHNICAL [2] - 2034:13, 2106:11 TEN [1] - 2112:3 TENS [1] - 2089:21 TERM [2] - 2084:19, 2106:11 TERMS [4] - 2027:21, 2031:22, 2032:11, 2042:2 TERRIBLY [1] - 2101:24 TESTED [2] - 2068:18, 2068:24 TESTIFIED [11] - 2047:22, 2080:1, 2081:19, 2105:20, 2108:13, 2109:12, 2109:15, 2111:23, 2112:6, 2118:11, 2121:13 TESTIMONY [26] - 2027:8, 2031:3, 2047:21, 2047:23, 2047:25, 2048:1, 2048:8, 2048:10, 2048:12, 2048:14, 2062:21, 2068:18, 2079:14, 2079:16, 2080:16, 2081:13, 2081:24, 2087:7, 2087:17, 2088:15, 2089:10, 2089:13, 2109:22, 2110:7 TEXT [1] - 2067:9 THAT [3] - 2125:7, 2125:8, 2125:11 THE [80] - 2020:3, 2020:12, 2023:5, 2023:13, 2023:20, 2024:4, 2024:16, 2024:21, 2024:23, 2025:6, 2025:13, 2025:16, 2025:19, 2025:24, 2026:7,	2026:19, 2028:10, 2029:1, 2029:11, 2029:15, 2029:23, 2030:16, 2031:6, 2031:11, 2031:15, 2031:20, 2033:2, 2033:13, 2033:18, 2034:7, 2034:16, 2034:25, 2035:6, 2035:12, 2035:19, 2035:23, 2036:8, 2036:12, 2036:25, 2037:10, 2039:16, 2039:21, 2039:24, 2040:8, 2040:17, 2040:20, 2041:1, 2041:9, 2041:12, 2041:14, 2041:20, 2041:23, 2042:1, 2042:25, 2043:6, 2043:11, 2043:15, 2043:23, 2044:7, 2044:9, 2044:16, 2044:19, 2044:23, 2045:13, 2046:5, 2046:8, 2046:9, 2081:14, 2124:3, 2124:12, 2124:15, 2125:6, 2125:7, 2125:8, 2125:9, 2125:10, 2125:11, 2125:12, 2125:13 THEME [1] - 2108:8 THEORY [1] - 2030:20 THEREFORE [5] - 2048:24, 2049:7, 2108:9, 2108:20, 2113:23 THIN [1] - 2027:4 THINKING [1] - 2108:16 THINKS [1] - 2092:20 THIRD [4] - 2036:3, 2037:24, 2049:12, 2077:17 THIRD [2] - 2037:24, 2038:3 THIS [1] - 2125:15 THOUSAND [2] - 2113:8, 2117:25 THOUSAND-ACRE [1] - 2117:25 THOUSANDS [3] - 2088:8, 2089:21, 2118:1 THREATENS [1] - 2039:2 THREE [20] - 2034:3, 2034:14, 2051:4, 2052:18, 2053:24,	2054:22, 2055:10, 2056:7, 2057:3, 2075:15, 2076:4, 2076:10, 2076:25, 2092:3, 2093:10, 2096:25, 2097:24, 2102:1, 2112:1, 2112:2 THREE-AND-A-HALF [1] - 2112:1 THRESHOLD [1] - 2030:22 THROUGHOUT [3] - 2047:10, 2101:8, 2115:7 THROW [1] - 2089:15 THROWING [2] - 2038:17, 2039:12 THRUST [1] - 2039:6 THRUSTING [1] - 2039:14 THURSDAY [2] - 2019:14, 2023:1 TIKTOK [1] - 2067:12 TILTS [1] - 2123:7 TIME-CONSUMING [1] - 2071:23 TITLE [1] - 2125:8 TO [2] - 2019:8, 2125:8 TODAY [5] - 2043:24, 2109:2, 2109:9, 2109:10 TODD [2] - 2104:6, 2104:11 TOGETHER [1] - 2114:17 TOOK [4] - 2024:3, 2027:7, 2047:7, 2062:6 TOP [1] - 2123:15 TORT [2] - 2060:4 TORTS [1] - 2060:6 TOTAL [4] - 2059:13, 2059:22, 2059:23, 2080:23 TOUCH [1] - 2040:21 TOUCHING [1] - 2068:11 TOUR [2] - 2074:19, 2075:3 TRACK [1] - 2043:9 TRAILING [1] - 2038:11 TRANSACTIONS [1] - 2049:12 TRANSCRIPT [3] - 2019:13, 2125:9, 2125:11 TRASH [1] - 2076:11
	T			
	TABLE [2] - 2045:10, 2111:3 TABLET [1] - 2067:8 TALKS [5] - 2084:7, 2089:2, 2092:19, 2101:20, 2101:21 TAMMY [3] - 2078:4, 2078:5, 2122:8 TANK [1] - 2120:12 TAP [4] - 2109:24,			

TRAVEL [3] - 2110:16, 2111:6, 2113:16 TRAVELING [1] - 2106:16 TRAVELS [5] - 2084:20, 2105:11, 2105:12, 2110:18, 2111:1 TREAT [1] - 2080:9 TREATED [1] - 2099:8 TREATMENT [12] - 2079:11, 2081:1, 2081:25, 2099:17, 2118:5, 2118:9, 2118:12, 2119:9, 2119:11, 2119:15, 2120:7, 2121:1 TREMENDOUS [1] - 2088:4 TRESPASS [29] - 2025:5, 2025:7, 2025:10, 2025:11, 2025:21, 2028:20, 2029:4, 2029:6, 2029:12, 2030:14, 2030:18, 2031:24, 2032:8, 2032:10, 2032:16, 2032:21, 2032:25, 2033:14, 2034:8, 2034:24, 2037:4, 2042:14, 2042:16, 2049:8, 2050:1, 2061:12, 2113:25, 2121:16 TRESPASS [1] - 2056:18 TRESPASSED [2] - 2030:19, 2056:19 TRIAL [1] - 2019:13 TRIAL [14] - 2038:11, 2038:25, 2039:7, 2047:10, 2062:22, 2067:15, 2068:6, 2068:19, 2068:24, 2068:25, 2069:3, 2072:21, 2075:24, 2111:4 TRIALS [1] - 2071:24 TRIED [3] - 2098:10, 2100:12, 2100:13 TRIGGER [1] - 2094:15 TRIVIAL [3] - 2051:9, 2117:7, 2118:2 TROWBRIDGE [2] - 2023:16, 2035:10 TROWBRIDGE [1] - 2020:15 TRUE [20] - 2034:12, 2050:7, 2050:8,	2065:13, 2074:1, 2083:24, 2087:10, 2090:19, 2092:25, 2093:9, 2108:23, 2108:24, 2113:15, 2113:17, 2115:9, 2116:8, 2122:20 TRUE [1] - 2125:9 TRUTH [2] - 2068:18, 2075:18 TRY [2] - 2068:2, 2095:11 TRYING [5] - 2036:23, 2090:21, 2095:10, 2095:25, 2108:18 TUMORIGENIC [1] - 2086:3 TURN [6] - 2025:9, 2026:13, 2026:19, 2052:3, 2057:20, 2068:11 TURNED [2] - 2110:6, 2110:7 TURNING [4] - 2072:22, 2072:23, 2073:11, 2109:5 TURNOUT [2] - 2108:12, 2110:6 TURNOUTS [2] - 2107:16, 2107:17 TV [1] - 2066:1 TWICE [2] - 2070:16, 2119:5 TWITTER [1] - 2067:11 TWO [17] - 2025:2, 2025:6, 2051:3, 2052:11, 2053:20, 2054:18, 2055:7, 2056:5, 2056:24, 2058:17, 2061:14, 2064:1, 2085:16, 2097:15, 2098:22, 2117:4, 2122:17 TYPE [5] - 2053:24, 2054:1, 2054:4, 2056:14, 2077:14 TYPES [1] - 2088:24 TYPO [2] - 2110:19, 2111:14 TYPOGRAPHICAL [2] - 2042:22, 2043:3	UNANIMOUS [4] - 2066:10, 2066:16, 2069:24, 2070:4 UNCONTESTED [1] - 2087:11 UNDELINEATED [1] - 2112:17 UNDER [11] - 2024:19, 2036:2, 2042:16, 2048:21, 2060:5, 2061:2, 2079:19, 2080:2, 2080:7, 2121:16 UNDERGROUND [3] - 2087:15, 2087:19 UNDERSTOOD [4] - 2025:24, 2034:25, 2087:3, 2119:1 UNDERTAKEN [1] - 2095:14 UNDIFFERENTIATE D [1] - 2112:17 UNDISPUTED [5] - 2087:7, 2100:8, 2118:14, 2120:4, 2122:21 UNDOUBTEDLY [1] - 2059:8 UNFOLDED [1] - 2071:9 UNINTENTIONAL [1] - 2052:20 UNIQUE [1] - 2034:2 UNIT [1] - 2099:19 UNITED [1] - 2086:17 UNITED [4] - 2019:1, 2125:6, 2125:8, 2125:13 UNJUST [1] - 2064:20 UNLIKE [1] - 2048:7 UNREASONABLE [3] - 2052:20, 2055:8, 2057:16 UNREASONABLY [1] - 2054:24 UNSAFE [3] - 2051:14, 2083:8, 2083:9 UNWILLING [2] - 2066:18 UP [35] - 2027:1, 2035:3, 2045:25, 2046:1, 2070:23, 2073:11, 2075:6, 2076:18, 2076:25, 2077:20, 2084:24, 2089:5, 2089:9, 2090:5, 2091:6, 2091:18, 2092:4, 2092:19, 2094:24,	2101:5, 2101:7, 2101:10, 2101:12, 2103:7, 2104:19, 2107:7, 2108:1, 2112:12, 2112:20, 2112:25, 2113:9, 2114:2, 2115:4, 2120:23, 2121:19 UPPERMOST [2] - 2098:19, 2098:20 USEFUL [2] - 2029:2, 2037:15 USEPA [2] - 2098:11, 2100:20 USES [2] - 2031:13, 2085:7 USGS [1] - 2086:17 USUFRUCTUARY [7] - 2029:4, 2032:2, 2032:18, 2033:11, 2036:16, 2036:18, 2036:21 UTILITY [1] - 2056:10	2068:22, 2069:24, 2070:2, 2070:4, 2070:5, 2070:6, 2072:16, 2121:8, 2124:13 VERSION [4] - 2024:6, 2042:15, 2043:9, 2043:24 VERSUS [3] - 2023:6, 2027:21, 2044:24 VESSELS [4] - 2079:11, 2119:22, 2120:12 VIA [1] - 2067:9 VIAL [1] - 2031:24 VICARIOUS [1] - 2049:10 VICE [2] - 2074:21, 2095:3 VICTIM [1] - 2095:22 VIDEO [1] - 2094:19 VIEW [7] - 2027:4, 2037:15, 2039:1, 2049:20, 2068:3, 2068:5 VIEWED [1] - 2078:13 VIEWS [2] - 2066:14, 2124:9 VILE [1] - 2064:22 VINYL [1] - 2117:14 VIOLATE [1] - 2088:22 VIOLATES [1] - 2069:6 VIOLATING [2] - 2047:16, 2098:8 VIOLATION [1] - 2101:20 VIOLATIONS [2] - 2099:7, 2101:14 VISIT [1] - 2068:3 VOC [2] - 2094:12, 2107:16 VOCS [4] - 2042:17, 2042:20, 2099:9, 2107:19 VOLATILE [1] - 2097:9 VOLUME [1] - 2019:8 VOTE [1] - 2069:25 VS [1] - 2019:7
V				
V-201 [2] - 2079:13, 2119:15 V-205 [4] - 2079:25, 2080:11, 2081:2, 2119:15 VALLEY [4] - 2023:6, 2044:24, 2049:24, 2050:24 VALLEY [1] - 2019:5 VALUE [5] - 2053:24, 2053:25, 2054:12, 2054:15, 2060:25 VALVES [1] - 2120:12 VAPOR [3] - 2085:11, 2085:14, 2085:17 VAPORS [2] - 2085:19, 2085:20 VARIOUS [2] - 2099:7, 2105:1 VELOCITY [4] - 2110:24, 2111:8, 2112:5, 2112:7 VERDICT [31] - 2023:19, 2034:17, 2040:25, 2042:7, 2042:11, 2042:19, 2043:17, 2044:5, 2047:11, 2058:23, 2058:24, 2059:4, 2059:6, 2059:10, 2059:21, 2062:15, 2066:1, 2066:6, 2066:9, 2066:16, 2066:22, 2066:23,				
W				
WAIT [3] - 2081:15, 2099:20, 2107:12 WAITING [2] - 2080:18, 2080:23 WAIVED [1] - 2037:22 WAIVER [5] - 2041:6, 2041:18, 2092:9,				

<p>2095:10, 2095:16 WALKS [1] - 2084:7 WALL [1] - 2104:22 WANTS [1] - 2097:25 WARNING [1] - 2051:15 WASHINGTON [1] - 2020:15 WASTE [28] - 2076:11, 2077:21, 2084:10, 2086:8, 2088:17, 2090:11, 2090:25, 2091:3, 2091:6, 2091:9, 2094:22, 2095:13, 2097:15, 2097:21, 2098:1, 2098:13, 2098:16, 2099:15, 2099:18, 2099:19, 2099:22, 2100:5, 2100:11, 2100:23, 2102:10 WASTES [7] - 2087:2, 2087:14, 2099:8, 2099:21, 2100:8, 2100:16, 2100:19 WASTEWATER [2] - 2084:17, 2084:18 WATCH [3] - 2067:20, 2120:15, 2120:16 WATER [1] - 2019:5 WATER [66] - 2024:18, 2025:11, 2025:12, 2025:17, 2027:13, 2028:3, 2030:10, 2030:25, 2031:3, 2031:25, 2032:16, 2033:3, 2033:4, 2033:8, 2034:19, 2061:9, 2061:16, 2061:17, 2061:22, 2062:2, 2062:4, 2062:6, 2072:2, 2078:22, 2078:23, 2079:9, 2080:11, 2081:6, 2081:7, 2081:24, 2086:24, 2087:19, 2087:20, 2087:21, 2093:8, 2093:25, 2094:1, 2095:21, 2096:9, 2096:22, 2098:2, 2101:10, 2102:16, 2103:25, 2106:24, 2107:3, 2108:3, 2109:3, 2110:1, 2110:17, 2110:18, 2118:5, 2118:7, 2118:9, 2118:13, 2118:21, 2118:22, 2118:25, 2119:1,</p>	<p>2119:3, 2121:12, 2123:18 WATER [53] - 2023:6, 2025:20, 2027:21, 2029:21, 2044:24, 2049:24, 2050:24, 2051:1, 2051:3, 2052:6, 2052:8, 2052:9, 2053:4, 2053:6, 2053:12, 2053:15, 2053:22, 2054:9, 2054:24, 2055:3, 2055:11, 2055:14, 2055:20, 2055:22, 2056:11, 2056:13, 2056:19, 2056:20, 2056:22, 2057:3, 2057:5, 2057:7, 2057:11, 2057:19, 2058:4, 2060:7, 2060:9, 2060:14, 2060:19, 2061:8, 2062:12, 2062:14, 2062:24, 2063:1, 2063:5, 2063:7, 2064:20, 2065:2, 2070:14, 2097:7, 2097:24, 2118:15 WATER'S [17] - 2051:5, 2053:1, 2053:8, 2053:17, 2056:17, 2057:1, 2058:1, 2058:4, 2058:6, 2058:8, 2058:14, 2058:18, 2058:20, 2059:18, 2059:23, 2061:2, 2061:4 WATERS [1] - 2087:15 WEAKER [4] - 2047:18, 2047:20, 2074:25, 2114:10 WEBSITE [1] - 2067:10 WEEK [1] - 2113:1 WEEKS [2] - 2074:15, 2080:14 WEIGH [1] - 2121:18 WEIGHT [2] - 2048:2, 2066:21 WELL-KNOWN [2] - 2085:21, 2087:12 WELL-POLISHED [1] - 2112:6 WELLS [66] - 2024:18, 2025:11, 2025:12, 2025:17, 2028:4, 2028:5, 2031:2, 2031:3, 2033:4,</p>	<p>2052:10, 2061:10, 2061:18, 2062:7, 2062:9, 2086:12, 2086:22, 2092:22, 2092:25, 2093:1, 2093:2, 2093:3, 2093:4, 2093:9, 2093:11, 2093:12, 2093:24, 2095:17, 2098:2, 2098:9, 2099:2, 2099:4, 2102:1, 2102:13, 2102:17, 2103:9, 2103:14, 2103:17, 2104:15, 2104:23, 2105:1, 2105:14, 2106:3, 2106:6, 2106:7, 2106:14, 2106:20, 2106:23, 2112:8, 2112:18, 2113:10, 2113:13, 2114:17, 2114:23, 2114:24, 2114:25, 2116:11, 2116:21, 2117:16, 2118:8 WENCK [3] - 2076:1, 2076:7 WEST [1] - 2085:4 WEST [1] - 2019:24 WESTERLY [2] - 2085:1, 2105:8 WESTERN [1] - 2019:2 WETRANSFER [1] - 2023:18 WHEREAS [1] - 2034:10 WHITTAKER [135] - 2023:6, 2023:15, 2029:3, 2040:9, 2044:24, 2048:18, 2048:19, 2048:20, 2049:4, 2049:6, 2050:4, 2051:2, 2051:17, 2051:22, 2052:7, 2052:11, 2052:22, 2053:17, 2054:24, 2055:5, 2055:7, 2055:10, 2055:13, 2055:21, 2055:23, 2056:19, 2056:24, 2057:12, 2057:23, 2058:1, 2058:2, 2058:6, 2058:12, 2058:14, 2060:8, 2063:6, 2063:24, 2063:25, 2064:4, 2064:6, 2064:11, 2064:25, 2070:18, 2072:6,</p>	<p>2072:10, 2073:12, 2073:19, 2073:22, 2074:2, 2074:4, 2074:17, 2074:22, 2075:18, 2075:25, 2076:2, 2076:7, 2077:7, 2078:12, 2078:18, 2078:22, 2078:24, 2080:7, 2080:10, 2081:23, 2083:19, 2084:11, 2084:25, 2085:16, 2086:4, 2087:8, 2087:22, 2088:16, 2088:21, 2091:1, 2091:19, 2091:25, 2093:5, 2094:10, 2095:11, 2095:20, 2096:7, 2096:21, 2097:10, 2098:8, 2099:13, 2100:24, 2101:6, 2101:11, 2101:16, 2101:24, 2101:25, 2102:14, 2102:23, 2104:10, 2104:20, 2105:3, 2105:7, 2105:9, 2105:14, 2105:22, 2106:1, 2106:6, 2106:13, 2106:19, 2106:25, 2107:6, 2107:13, 2110:9, 2113:19, 2113:21, 2113:23, 2114:16, 2115:7, 2115:21, 2115:24, 2116:5, 2116:6, 2116:16, 2117:3, 2117:25, 2118:4, 2120:5, 2120:11, 2121:7, 2121:10, 2122:12, 2122:14, 2123:2, 2123:3, 2123:12, 2123:19, 2124:1 WHITTAKER [1] - 2019:8 WHITTAKER'S [30] - 2050:22, 2050:25, 2051:4, 2052:1, 2052:19, 2053:3, 2053:5, 2053:7, 2053:10, 2053:13, 2054:11, 2054:14, 2054:25, 2056:10, 2056:12, 2056:16, 2057:6, 2060:12, 2060:23, 2063:1, 2064:12, 2064:19, 2073:5, 2073:11, 2073:17, 2090:13, 2098:5, 2104:9,</p>	<p>2104:12, 2112:5 WHITTAKER-BERMITE [3] - 2115:24, 2116:5, 2116:16 WHOLE [6] - 2045:8, 2085:2, 2108:1, 2116:23, 2118:6, 2118:23 WIDESPREAD [2] - 2082:14, 2092:5 WILLFUL [1] - 2064:13 WINDING [1] - 2115:4 WISH [6] - 2037:6, 2037:19, 2037:20, 2038:20, 2044:10, 2046:16 WISHES [1] - 2045:2 WITH [1] - 2125:12 WITHDRAW [2] - 2039:19, 2039:23 WITNESS [9] - 2048:6, 2048:13, 2075:12, 2076:2, 2105:22, 2108:5, 2115:16, 2117:17, 2119:4 WITNESS'S [1] - 2048:2 WITNESSED [1] - 2068:19 WITNESSES [12] - 2047:24, 2062:21, 2068:9, 2068:17, 2077:18, 2090:14, 2093:21, 2108:8, 2112:5, 2113:1, 2118:10, 2123:9 WITNESSES [2] - 2021:1, 2021:3 WONDERING [1] - 2059:10 WORD [7] - 2037:2, 2088:24, 2090:10, 2115:16, 2115:18, 2116:1 WORD [3] - 2042:15, 2043:9, 2046:13 WORDING [1] - 2043:21 WORDS [7] - 2075:2, 2075:9, 2077:1, 2077:8, 2079:20, 2088:24, 2098:19 WORKS [2] - 2119:8, 2119:10 WOUND [1] - 2027:1 WOW [2] - 2108:16, 2108:21 WRITE [1] - 2078:3</p>
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WRITING ^[6] - 2067:8,
2069:15, 2069:17,
2080:6, 2083:15,
2096:15
WRONGFUL ^[2] -
2049:17, 2060:12
WROTE ^[4] - 2079:17,
2080:15, 2095:2,
2115:23

Y

YEAR ^[8] - 2081:4,
2081:9, 2092:13,
2092:14, 2110:18,
2111:9, 2111:14,
2111:25
YEARS ^[25] - 2074:9,
2076:4, 2076:8,
2076:25, 2078:18,
2079:21, 2092:3,
2094:11, 2095:5,
2096:25, 2097:6,
2101:19, 2103:2,
2103:3, 2103:8,
2105:21, 2110:21,
2112:2, 2112:3,
2120:3, 2120:6,
2121:2
YESTERDAY ^[15] -
2026:3, 2026:22,
2030:6, 2040:4,
2042:15, 2080:17,
2084:8, 2084:12,
2088:20, 2089:11,
2093:22, 2105:19,
2111:16, 2115:5,
2115:19
YOURSELF ^[1] -
2066:11
YOUTUBE ^[1] -
2067:11

Z

ZERO ^[1] - 2114:10
ZOYD ^[2] - 2085:16,
2088:20